UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Douglas A. Kelley, in his capacity as the Trustee of the BMO Litigation Trust, Plaintiff, vs. BMO Harris Bank N.A., as successor to M&I Marshall and Ilsley Bank, Defendant.	File No. 19-cv-1756 (WMW) St. Paul, Minnesota October 6, 2022 1:05 p.m.

BEFORE THE HONORABLE WILHELMINA M. WRIGHT
UNITED STATES DISTRICT COURT JUDGE

(PRETRIAL CONFERENCE)

Proceedings reported by certified court reporter; transcript produced with computer.

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P R O C E E D I N G S

IN OPEN COURT

LAW CLERK: The case before the Court is Case Number 19-cv-1756, Douglas A. Kelley vs. BMO Harris Bank.

Counsel, please make your appearances for the record.

MR. COLLYARD: Good morning, Your Honor. Mike Collyard on behalf of plaintiff.

THE COURT: Good afternoon.

MR. GLEESON: Good afternoon, Judge. John Gleeson from Debevoise & Plimpton for the defendant.

THE COURT: Thank you. Good afternoon.

MR. GLEESON: Judge, do you want to introduce the others at the table or --

THE COURT: I would like everyone who is appearing and representing a party here to be noted on the record.

MR. GLEESON: Would you like me to do it, or would you like them to introduce --

THE COURT: You may do it, certainly.

MR. GLEESON: Okay. With me at the table are Mike Schaper.

MR. SCHAPER: Good afternoon, Your Honor.

MR. GLEESON: Rich Spehr.

MR. SPEHR: Good afternoon.

MR. GLEESON: Keith Moheban.

MR. MOHEBAN: Good afternoon.
THE COURT: Good afternoon.
MR. GLEESON: Adine Momoh.
MS. MOMOH: Good afternoon, Your Honor.
THE COURT: Good afternoon.
MR. GLEESON: Susan Gittes.
MS. GITTES: Good afternoon.
MR. GLEESON: And Josh Yount.
MR. YOUNT: Good afternoon, Your Honor.
THE COURT: Good afternoon.
MR. GLEESON: I will let my adversary introduce his colleagues.
THE COURT: Thank you.
MR. COLLYARD: Your Honor, with me is Doug Kelley.
THE COURT: Good afternoon.
MR. KELLEY: Good afternoon, Your Honor.
THE COURT: Joe Anthony.
MR. ANTHONY: Afternoon, Your Honor.
THE COURT: Good afternoon.
MR. COLLYARD: David Marder.
MR. MARDER: Good afternoon.
THE COURT: Good afternoon.
MR. COLLYARD: And Peter Ihrig.
MR. IHRIG: Good afternoon, Your Honor.
THE COURT: Good afternoon. Thank you.

I will just review at this time the matters that have been provided to you, Counsel, as to how we will proceed in an orderly fashion in our trial.

Cell phones must be turned off during trial.

Counsel will conduct witness examinations from the podium, and you'll approach the witness, the bench, the jury only with permission from the Court.

Only water is permitted here in the courtroom, and no food or other drinks are permitted.

It's important when you're making your arguments -- well, when you're making your objections, that you not make arguments during the objection and instead provide the basis for your objection. If argument is necessary, we will conduct a sidebar for that purpose.

Counsel, you will stand at the counsel table when objecting and at the podium when you are addressing the Court.

Also, do not speak over one another or over the witnesses in the course of our trial.

It's important to address the Court, opposing counsel, witnesses, our court staff with civility, with formality, using titles and last names.

When we are proceeding with the trial, only the attorney asking questions and the attorney defending may argue to the Court during our sidebar proceedings.

You are reminded to be mindful about the evidence that may be admitted, and counsel must abide by the pretrial rulings during the trial.

Also, the parties should be familiar with our courtroom technology before you start -- this trial starts; and if you need to have access to the courtroom for purposes of doing so, please be in touch with my staff so that you can do so.

And you are reminded that when using the ELMO, it's helpful to the Court and to the jury to use the zoom feature so that the documents are visible.

There will be 12 jurors. We will call 18 jurors to answer voir dire, and our strikes will occur in the following order: The defendant will have one, the plaintiff will have one, the defendant will have one, the plaintiff will have one, the defendant will have one, and the plaintiff will have one.

Are there any additions or objections by the parties to the Court's voir dire questions?

MR. GLEESON: None from the defendant.

MR. COLLYARD: None from plaintiff, Your Honor.

THE COURT: Okay. Thank you.

Each party will be allowed 10 to 15 minutes of voir dire after the Court's voir dire, and that voir dire will be conducted at the podium. And the defense counsel

will go first.

If the Court excuses a juror for cause, the new juror replacing the excused juror will retain his or her original juror number, and it will not adopt the juror number of the juror who was replaced. Understood?

Okay. And the process for striking the jurors will be conducted with the jurors in the courtroom, and I'll ask who will be seated at counsel table during these proceedings?

MR. COLLYARD: Your Honor, for plaintiff, it will be myself, Mike Collyard; Joe Anthony; Doug Kelley; and Ryan Malphurs, that's M-a-l-p-h-u-r-s.

THE COURT: Thank you, Counsel.

MR. GLEESON: Judge, it will be me, John Gleeson; Mr. Moheban; Mr. Schaper; Ms. Momoh; Mr. Spehr; Gina Parlovecchio, who I did not introduce you to here today, although she's in the courtroom. There she is.

THE COURT: Thank you, Ms. Parlovecchio.

MR. GLEESON: Another lawyer from my firm, Morgan Davis, who is here; and Susan Gittes, whom you met. We will have two representatives from the client sitting behind.

THE COURT: Okay.

MR. GLEESON: Fair enough?

THE COURT: Yes.

MR. GLEESON: Thank you, Judge.

THE COURT: Right now I will go through the list of parties, attorneys, and witnesses to verify pronunciation, and so please correct me as needed.

Adine Momoh, Bernita Hile, BMO Harris Bank, Carolyn Moline. Is that correct?

MR. GLEESON: Yes.

THE COURT: Okay.

MR. GLEESON: Sorry. Yes.

THE COURT: And for this purpose, Counsel, you may remain seated when addressing the Court. Thank you.

Catherine Cali- -- that's not right.

MR. ANTHONY: Catherine Ghiglieri, Your Honor, ga-lair-ee. Pretty easy.

THE COURT: All right. Catherine Ghiglieri?

MR. ANTHONY: Catherine Ghiglieri.

THE COURT: Thank you.

Charles Grice, Christopher --

MR. GLEESON: Do you want us to say "correct" or just correct you if you are wrong?

THE COURT: Please correct me if I am wrong. Okay?

Christopher Flynn, David Marder, David Scherer, Deanna Coleman, Debbie Lindstrom, Debra Bogo-Ernst, Douglas Kelley, Edward Jambor, Elliot Berman, Gil Davis, Jeanne Crain, Jerry Sims, John Gleeson, John Vanderheyden.

MR. SCHAPER: That's right.

THE COURT: Thank you. John -- is it sah-bais?

MR. GLEESON: Say-bees.

THE COURT: Say-bees. Thank you.

MR. GLEESON: Rhymes with "rabies."

MR. COLLYARD: Your Honor, it's say-bis.

MR. GLEESON: Oh, thank you.

THE COURT: Sabes, S-a-b-i-s, would be the phonetical spelling?

MR. COLLYARD: Correct.

THE COURT: Thank you.

Jonathan Ingrisano.

MR. GLEESON: Correct.

THE COURT: Joseph Anthony, Joseph Richie, Karl Jarek, Keith Moheban.

MR. MOHEBAN: Moe-ha-bon.

THE COURT: Moheban. Okay. Thank you.

Kelley Maltsch, Lance Bellyard -- I'm sorry, Breiland.

MR. COLLYARD: Bry-land, Your Honor.

THE COURT: Breiland. Thank you.

Lucia Nale, Mandy Ramlow.

MR. YOUNT: It's loo-see, nahl-ee.

THE COURT: Okay. And is it loo-see-ah or loo-see?

MR. YOUNT: Loo-see.

THE COURT: Loo-see. And nahl-ee, is that what you said?

MR. YOUNT: Yes, that's correct, Your Honor.

THE COURT: Thank you. Mandy Ramlow.

MS. MOMOH: Ram-loe, Your Honor.

THE COURT: Thank you.

Mary Pesch. Michael Couillard or Collyard?

MR. COLLYARD: Caul-yard, Your Honor.

THE COURT: Thank you. Collyard.

Michael Schaper, Morgan Davis, Morgia Holmes.

MR. COLLYARD: Moor-ja.

THE COURT: Morgia, Nicholas Bauer, Patricia Currie-Smotherman, Paul Stroble, Peter Ihrig, Peter Janczak, Raymond Neufeldt, Ryan Lawrence, Sara Indahl, Sara Johnson.

MR. COLLYARD: Your Honor, just a correction. It's Sandra Indahl.

THE COURT: Oh, I'm sorry. That is correct. I am misreading that. Sandra Indahl. Is that correct?

MR. COLLYARD: That's correct.

THE COURT: Thank you.

Sara Johnson, Shandra Roehrig.

MR. GLEESON: Roar-ig.

MS. MOMOH: Your Honor, it's shan-dra.

THE COURT: Shandra, thank you.

Shari Rhode.

MR. GLEESON: Road-ee.

THE COURT: Rhode, thank you.

Simon Root, Susan Reagan -- stump the judge.

MS. GITTES: I am glad I was the one that stumped you. Git-is.

THE COURT: Gittes. Thank you.

MS. GITTES: But you can botch it. You'll be in good company.

THE COURT: Thank you, Ms. Gittes. Theodore Martens, and Thomas Haller. Is that correct?

Okay. I'll ask the parties to ensure that we have sufficient witnesses available each day to make use of the entire trial day.

A list of witnesses the parties expect to call each day must be provided to the Court and opposing counsel by e-mail no later than 7:00 p.m. the previous day.

MR. GLEESON: Judge, can I be heard on that, if not now, when we're done?

THE COURT: You may now.

MR. GLEESON: Thank you. And to go back, there are lawyers who are no longer going to be witnesses that are on our list in case you're keeping score. Ms. Bogo-Ernst, Mr. Ingrisano, and Lucy Nale are no longer going to be witnesses in light of intervening events.

And then, of course, you've met Mr. Spehr, Richard Spehr, and Gina Parlovecchio who are not witnesses, but they are part of the trial team.

On this, we were grateful to read that there are going to be long trial days five days a week, going to move the case along. The 7:00 p.m. the night before, and this is not something we haven't interacted with our colleagues across the bar about, because we have some out-of-town witnesses and there's some witnesses whose presence we'll procure, but who no longer work for BMO, we're going to have some difficulty in making sure we have them -- well, let me back up.

We do want to have full trial days, but we're also trying to reconcile the tension that this 7:00 p.m.-the-night-before notification provides because we don't really think it's reasonable to have people lined up outside the courtroom unnecessarily.

So long story short, we've asked plaintiff to -- for two things: One, is to give us the best estimate of when each witness they expect to bring will testify a week in advance, and we know that can't be carved in stone because trials are not scientific in that way. But also we've asked if they would agree at the end of each trial day to tell us the expected witnesses for the next two days, and of course we would do the same in our case.

But if we wait until 7:00 p.m. the night before a trial day, we're going to have to get someone from Milwaukee or someone who now works for another bank, and it might be more difficult. If we have a little advance notice, I think we'll do a much better job of both ensuring there's no dead time in the courtroom, witnesses until 5:00, but also not unduly burdening witnesses who live out of state -- I'm going to move this.

THE COURT: That's fine.

MR. GLEESON: -- who live out of state or work for another employer because it's harder to get them here without inconveniencing them.

THE COURT: And so your agreement is to do what that is different than what I have asked?

MR. GLEESON: We don't have an agreement, but we have proposed that to counsel, and we want to work in good faith with them to try to reach accommodations that move the trial along. In the event we can't, it may be something I come back to the Court on with regard to how short the time is for us to give notice to witnesses to show up in court.

THE COURT: Is there any need for a response, Counsel?

MR. GLEESON: I don't mean to put counsel on the spot. We'll talk about it. We've got some time between now and when the trial begins, but I'm just apprising the Court

of a concern we have. Just and we want to balance the amount of time witnesses have to spend waiting outside and the Court's desire to have the trial proceed without any dead time at the end of the day -- of a trial day.

THE COURT: Counsel, do you wish to be heard?

MR. COLLYARD: Thank you, Your Honor. Plaintiff, we don't have any disagreement with what Mr. Gleeson is proposing, and certainly we want to move the trial along. But it is very difficult to predict that far in advance. But we would be okay with the two days' at the end of each trial day, and for their out-of-state folks, if we gave them three days' notice, we could certainly do that.

THE COURT: So I will allow counsel to make any agreements you wish to make that will allow for your convenience. The Court needs to have an e-mail no later than 7:00 p.m. the previous day as to who will be serving as a witness. Understood?

MR. COLLYARD: Understood.

MR. GLEESON: Thank you, Judge.

THE COURT: You're welcome.

Witnesses will be sequestered from the courtroom prior to their testimony pursuant to Federal Rule of Evidence 615, except that each side may designate a party representative to appear in the courtroom during the trial, and no sequestered witness is permitted to view realtime

transcripts of the proceedings prior to their testimony.

MR. GLEESON: Judge, does that exclude expert witnesses?

THE COURT: I'm happy to hear from counsel as to that.

MR. MARDER: That was going to be our question as well, Your Honor. Certainly we have no issue with the fact witnesses, but traditionally the experts are present because they're going to need to base their testimony on the factual testimony before them. So we interpreted this to exclude expert witnesses, and we're happy with that arrangement.

MR. GLEESON: As did we.

THE COURT: Okay. Very well.

MR. GLEESON: Thank you.

THE COURT: Then expert witnesses are not required to comply with that.

MR. MARDER: Your Honor, could I just get a point of clarification on something you mentioned earlier? You mentioned the 12 jurors. We just wanted to ask with respect to jurors versus alternates, does that include alternates or there will be alternates in addition to the jurors?

THE COURT: We will have alternates.

MR. MARDER: In addition to the 12?

THE COURT: Yes.

MR. MARDER: Okay. Also, you had asked about who

would be present at the counsel table, and I think counsel had different interpretations of that. Mr. Gleeson listed everybody for the whole trial. I think Mr. Collyard just listed the people who would be present during voir dire. Was your question broader than that? Because there will be additional people seated at the table later on during the trial if you needed those names.

THE COURT: It is broader than that --

MR. MARDER: Okay.

THE COURT: -- so please provide information to the Court.

MR. COLLYARD: I'm sorry, Your Honor. I thought it was just talking about jury selection. During trial it will be myself, Doug Kelley, Joe Anthony; and then it's going to change, but I will give you various names. It will be David Marder, Peter Ihrig, and there may be some --

MR. ANTHONY: Joe Richie.

MR. COLLYARD: Yeah, Joe Richie, Ryan Lawrence, Morgia Holmes. Thank you, Your Honor.

THE COURT: I think we addressed the sequestration. Is there anything else that needs to be addressed as to that?

MR. GLEESON: No, but the alternates issue raised a question for me. How many alternates, Judge, do you intend to impanel?

THE COURT: I have not decided that yet.

MR. GLEESON: Okay. In any event, the principal 12 jurors, they will all deliberate, I take it? None of them will be deemed alternates?

THE COURT: Pardon me?

MR. GLEESON: You intend to have 12 jurors deliberating at the end of the case?

THE COURT: (Nodding.)

MR. GLEESON: Thank you.

THE COURT: Also, to avoid any delay, and to ensure that the parties can prepare their exhibits, the parties are to notify the Court and opposing counsel of deposition designations and objections at least 48 hours before testimony is expected to be presented by deposition so that the Court can make the appropriate rulings, and that is 48 hours, not 24 hours. I don't know if you have a document that says 24 hours. The ruling is 48 hours before.

Copies of the relevant transcripts also must be provided to the Court in advance; and if a deposition is used at trial, the court reporter will transcribe the deposition as it is played and/or read. So please provide the court reporter with a copy of the deposition transcript.

And also additional instructions regarding the use of deposition testimony at trial will be included in the Court's forthcoming motion in limine order.

I'll ask now, Counsel, how long will each party's opening statement be?

MR. COLLYARD: Your Honor, plaintiff plans to be around an hour.

MR. GLEESON: Judge, it's our -- we want to ask for a little bit more, 75 minutes for our opening.

THE COURT: For an opening statement?

MR. GLEESON: Yes. Obviously to the extent the Court affords us that luxury, we agree that plaintiff should have it as well. And I shouldn't describe it as a luxury. It's kind of a big, complicated case. We know that openings just unfold the map, but it's a big map.

THE COURT: The Court will so rule and provide direction.

MR. GLEESON: Thank you.

THE COURT: Opening statements will be given at the podium, and there will be a podium that faces the jury box. And, Counsel, you are not allowed to walk around the courtroom without permission.

Also, Counsel, you are to exchange your exhibits and that will be used during the opening statements, including any stipulated before trial exhibits and demonstratives. That must be done at least 24 hours before the trial begins.

And each party shall notify chambers at least one

hour before the trial begins whether there are any objections to the other party's opening statement exhibits. The Court will appreciate more than one hour's notice if that can be provided.

And any objections to the use of such exhibits in the opening statements will be heard during the jury selection -- I'm sorry, will be heard before jury selection begins.

Also, as to exhibits, do not display an exhibit to the jury or read aloud from the exhibit unless it has been admitted into evidence. And, Counsel, you shall e-mail opposing counsel a list of trial exhibits that counsel plans to use the following day, and that must be done by 7:00 p.m. on the preceding evening.

MR. ANTHONY: Your Honor, may we be heard on that point, Your Honor?

THE COURT: Yes, you may.

MR. ANTHONY: The question is this: We understand that if you're calling a witness direct, that you provide the other side with the exhibit you're going to use in your direct testimony. However, there will be a number of witnesses called by both sides adverse for cross-examination. Ordinarily you wouldn't disclose to the -- the cross-examiner wouldn't disclose to the adverse witness the road map that they were going to use with their

documents for cross-examination.

So we are reading your order to say that if you are calling a witness for direct, you turn it over. If you are calling for adverse, you wouldn't turn it over because you wouldn't be revealing your cross. You might not even know all the exhibits you would be using for cross until you hear the witness. So that's the way we read it and historically that's the way it's been done and I was wondering if that's what you intended.

THE COURT: You're saying if you are calling them for cross?

MR. ANTHONY: Yes.

THE COURT: Would they be your witness?

MR. ANTHONY: No, it wouldn't be our witness. We would be calling their witnesses adverse for cross-examination under the rules.

THE COURT: Okay.

MR. ANTHONY: There's going to be a lot of that.

MR. GLEESON: I'm not sure there's any daylight between us, but I think we ought to be clear about -- because we agree that to the extent that an exhibit is used solely for impeachment, you don't even know what the impeachment is going to be before the exam.

So what we would disclose, both sides, are exhibits that we intended to offer into evidence, whether

it's on direct or on cross, but that would not include exhibits that we intended to use only for impeachment purposes.

THE COURT: That's right, because they are not exhibits that are --

MR. GLEESON: Correct.

THE COURT: -- admitted into the record.

MR. GLEESON: I think we are of one mind on that, although, if not, maybe we ought to clear that up.

MR. ANTHONY: Ordinarily you wouldn't disclose your cross-examination exhibits because the witness would know what you were going to ask if they had the exhibit before them. That's why you're calling them for cross-examination under the rules adverse. And part of the advantage of doing that is the surprise that's generated on the cross-examination from the witness not knowing what exhibits are going to be covered. This deprives the examiner of the opportunity to cross-examine without the witness knowing exactly what you are going to say.

So I have never seen a situation where you're calling someone on cross-examination and you have to give them the road map of all your exhibits in advance. It's usually only limited for direct, when you are calling a witness for direct that you are not going to be leading, because you are going to be leading a lot on

cross-examination. That's when you would turn over all your exhibits in advance.

MR. GLEESON: Judge, I think direct and cross are the wrong thing to focus on, in part because the trustee is calling our witnesses. We'll address how we're going to proceed with witnesses that are on both lists, just so we're clear on that.

But when a party intends to offer into evidence an exhibit, the whole point of the notification requirement is to let folks know in advance what exhibits are going to be offered, whether it's technically a cross of an adverse witness or a friendly witness or technically a direct of an adverse witness. We intend, when we cross the witnesses that the trustee will call, if we know we're going to use an exhibit -- we know we are going to offer it into evidence, we think in fairness to our adversary and the Court, we should say that so that objections can be anticipated and ruled upon by the Court.

When we intend to use a document solely to impeach, that's the thing we don't know in advance what it's going to be and whether we intend to offer it in evidence.

But this is a simple case. There aren't any real surprises here. There are exhibits. There's no real tipping of the mitt in terms of identifying the exhibits that will be used when they examine one of their trustee

witnesses or a BMO witness. We don't think that -- we think the ordinary course is if you intend to offer it in evidence the next day, notify your adversary, notify the Court, and we ask the Court to so rule.

THE COURT: Counsel.

MR. ANTHONY: Your Honor, that's an interesting exposition, because in asking for 75 minutes of time, we heard how complicated and challenging and difficult this case was. Now I heard it is a simple case.

As a practical matter, Your Honor, this might be addressed if the parties were to stipulate, for example, on each of our exhibit lists. We've identified there's much overlap. If we agreed on those being exhibits admissible in evidence, this would not be a problem. We would just identify the ones that we've all agreed are in evidence.

But the parties have been challenged in coming to an agreement on stipulating to exhibits and on stipulating to, for example, their records and the authenticity. So a lot of this could be addressed if we could come to terms on that.

Absent that --

THE COURT: You said you have been -- you've tried to and you were challenged to do so?

MR. ANTHONY: We are challenged on that, Your Honor. For example, yesterday we sent them a list of

documents that overlap on both witness [sic] lists and asked if they could agree that those will come into evidence, and we haven't heard back. They say they will get back to us tomorrow. So this issue may be resolved in that fashion because there's much overlap on the exhibit lists.

But absent that, we should be allowed to use the exhibits that we intend to use. Many of them, if they are on the agreed-upon exhibit list, we'll tell them that. But if they're not on the agreed-upon exhibit list, we're not sure whether we will use them or not, depending upon what the witness says, and we don't want to be foreclosed from using an exhibit in cross-examination that we didn't anticipate using until we heard the witness's testimony. And that's the predicament we're in when you are on cross-examination.

When you are on direct, you know where you are going. You've got a blueprint laid out, what you are going to ask, what exhibits you are going to use. When you are on cross, you don't know what the witness is going to say.

For example, we've taken the depositions of their witnesses. What if they change their testimony and we didn't anticipate it? Are we going to be foreclosed from using a document? I don't think we should be.

THE COURT: You won't be foreclosed from using that document to impeach, but that is not an exhibit. When

you impeach a party-opponent, you do it with their prior inconsistent statement. You do not admit their prior inconsistent statement as evidence.

MR. ANTHONY: But the document might rebut the inconsistent statement. And under what the -- the defendant is proposing, we couldn't use a document to rebut an inconsistent statement because we didn't disclose it the night before.

So there are documents that will need to be used for rebuttal and otherwise that we would be foreclosed from using because we didn't anticipate it the night before because we didn't know what the witness was going to say the night before. So that's why it's an unusual process to require the cross-examiner to disclose all their exhibits in advance of cross-examining.

MR. GLEESON: I don't want to keep it going unnecessarily, but it's not what I'm saying. If it turns out that a document that the trustee did not intend to offer into evidence is useful for cross, whether it's a deposition transcript that's an inconsistent statement or otherwise, we don't expect that to be disclosed.

But it's a fairly, I'll suggest respectfully, simple and straightforward rule. If you intend to offer it in evidence, we should know about it. We'll notify them as well. It apprises the Court of what's coming the next day.

It apprises the adversary.

I'm not going to repeat myself. I'll rest on the remarks I've made.

THE COURT: Thank you, Counsel.

As the pretrial agenda indicates, all exhibits will be provided to jurors through Box, which is www.box.com, and parties will receive further information prior to trial regarding the use of Box.

At the end of each trial day, a representative from each party will work with chambers staff to cross-reference the exhibits that have been admitted that day, including ensuring that all exhibits that have been admitted each day are properly uploaded to Box.

And I will ask whether the Court has received electronic copies of all of the exhibits counsel plans to offer? I would like an audible answer.

MR. GLEESON: We agree. We're fine with all that.

MR. COLLYARD: We are too, Your Honor.

THE COURT: And we have received electronic copies of all of the exhibits?

MR. COLLYARD: Yes, Your Honor.

MR. GLEESON: Yes. There might be five or six more that we'll exchange, but to the extent those stragglers are not already with the Court, they will be as soon as we agree.

THE COURT: And when do you plan to meet and confer as to that?

MR. GLEESON: By the end of the week. It's just a handful of documents that is a grain of sand on the beach --

THE COURT: So the end of the week is by the close of business tomorrow.

MR. GLEESON: It is.

THE COURT: By Friday.

MR. GLEESON: Yes.

THE COURT: I just want to make sure we understand where we are.

MR. GLEESON: Thank you, Judge.

THE COURT: Are there any objections or additions to the draft preliminary jury instructions that the Court e-mailed to counsel?

MR. MARDER: Your Honor, we just have one point. We fully appreciate and respect what you said in the *Daubert* order that you would not be giving a preliminary instruction on spoliation, but just for the record, to preserve it for appeal, we want to just state that we do formally object to the lack of the inclusion of the spoliation instruction with the preliminary instructions. We understand you've already ruled against us, but just for the record, we would like to make that formal objection. Thank you, Your Honor.

THE COURT: Understood, and that objection is

noted.

MR. GLEESON: No objection from the defendant.

THE COURT: Then as to our trial schedule, jury selection will take place in Courtroom 7A in this courthouse beginning at 8:30 on Wednesday, October 12th.

In general, our court hours will be from 8:30 to noon and from 1:00 until 5:00 each day, and that will be Monday through Friday.

If counsel needs to discuss any issues with the Court outside of the jury's presence, counsel will meet with the Court at 8:00 a.m. before the jury arrives or at 5:00 p.m. after the Court has dismissed jurors.

And counsel for each party, please confirm now your estimates for how long you anticipate the trial will run.

MR. ANTHONY: Your Honor, we think, if the parties work cooperatively as counsel suggested they are willing to do and if we can stipulate to a lot of these exhibits, especially ones that are their records and the authenticity of their records and the summaries of those records, two and a half weeks, three weeks, two to three weeks should be enough for very efficient, seasoned lawyers like the plaintiffs have -- or defendants have to get this done.

THE COURT: I would say plaintiffs and defendants.

MR. ANTHONY: Yes. Thank you.

MR. GLEESON: Plaintiffs have them too.

This is so hard to predict. We put our heads together and tried to figure out how many hours in the aggregate. It's not only hard to predict, but I am notoriously bad at predicting it, I should mention.

We tried to figure out how many hours we would spend, us, examining our witnesses, trying to anticipate the degree to which the trustee's counsel will examine them, and we came up with roughly 40 hours, maybe five hours more of deposition playing.

So what does that boil down to? Maybe six, seven trial days, just for us, for our witnesses. So I think, again, with the disclaimer that I've never really actually been right at this, I actually think it's probably a three- to four-week trial, but you have long trial days, and we're going to work hard to use every minute of them.

And I might be wrong. Many of us are from out of town. We would love to go home sooner rather than later.

So I think it will be a little longer than my colleague across the aisle has anticipated, but not that much longer.

Does that answer the Court's question?

THE COURT: It tells me what you think, yes.

Counsel, you are required to notify chambers by e-mail no later than 7:00 each day whether there are issues

that the parties need to address with the Court before the jury is brought in. And, if so, provide a brief description of those issues. And the pretrial agenda has the e-mail addresses to which you must send that notification. I won't repeat them here.

At present, the parties have not indicated that they've agreed to any stipulations for the record. Do the parties offer any stipulations or intend to prior to the start of trial?

MR. GLEESON: Yes, Judge, we've been working on this. We've been -- the plaintiff has proposed a bunch of, about 170 or so, fact stipulations. This is not including prospective stipulations on spoliation. We've agreed to a substantial portion, roughly half. We're continuing to work on the remainder.

We proposed to the trustee about 115 stipulations of fact. We only did that on Monday. They're working on them. They made -- they asked us a follow-up question. We're running down the answer to that question. We're hoping to have a substantial number of stipulations.

As for documents relating to spoliation, we're working on stipulations there as well. We're working in good faith to try to reach agreement.

Before I turn it over to my colleagues over here on this side, I will say this: With respect to the use of

the stipulations at trial, it wasn't clear to us what the Court anticipated. Our preference and our -- we think a common practice is to the extent we have stipulations entered into prior to trial, we will use them in the case as they become relevant, read them to the jury in the context in which they are most informative to the jury.

I couldn't tell -- we couldn't tell from your order whether you anticipated reading them to the jury up front at the beginning of the trial. If not, we would ask you to entertain an application that we -- to the extent they're reached, they are used during the trial in context so they will be more informative than if they are just read to the jury at the beginning of the trial.

If I misunderstood what your order suggested in that regard, forgive me.

THE COURT: Let me tell you what I suggest, and then I'll hear from opposing counsel. It is my intent, if there are stipulations, that I will read the stipulation at the time it is appropriate to read the stipulation such that the jury is receiving information as to the stipulation in context with the evidence that is about to be presented or has been presented to them so that they understand the relevance of the stipulation and how that stipulation should be considered.

MR. GLEESON: Thank you. My mistake.

MR. ANTHONY: That was our understanding, Your Honor, that you would be guided by what the stipulation was and at the appropriate time would announce it to the panel, to the jury to let them know its relevance in the context of wherever we are.

There was --

THE COURT: And that said, that doesn't mean that you wait until the last minute to provide the stipulation. So I would like the stipulations in advance. We can talk about and you can notify me when it is appropriate to read that stipulation. Understood?

MR. ANTHONY: Yes.

MR. GLEESON: Yes.

MR. ANTHONY: Your Honor, two practice issues that I would like to raise, and I think this is about the time to do that.

Whenever the exhibits are disclosed to the other side in advance of the next day's witnesses, is the other party going to be expected to provide their objections in advance of the trial -- the next day so we can try to resolve them before we get before the jury with the witness on the stand? Because it would be much more efficient if we could resolve any objections before we get to the courtroom.

So I'd suggest that the next morning, if there are objections to the witnesses -- to the exhibits disclosed the

night before, that they be lodged with the opposing party so we can address it with you an hour before we start trial to hopefully eliminate the objection, if possible.

THE COURT: Is there any objection to proceeding in that manner, which sounds very reasonable to me?

MR. GLEESON: Sounds reasonable to us too, Judge, with the possible exception of foundation objections. Certainly relevance, but until a foundation -- if there's a dispute about the admissibility of a document and it relates to foundation, I'm not sure how we would do that in advance. I'm not trying to slow things down.

THE COURT: No, I understand the difference between a foundation objection and the other types of objections and stipulations that we're talking about. Understood?

MR. ANTHONY: It is here, Your Honor.

The other practice issue I think that may come up that I want to alert the Court to is there may be a need to use demonstratives. That the other side will object to the admissibility of the -- the exhibit could come in as an exhibit or be shown as a demonstrative, and it would be shown as a dispositive because one party or the other were objecting to it on foundation, and foundation would need to be laid by a subsequent witness.

And I highlight that for the Court because what

we're experiencing is there's a lot of bank records that need to be authenticated. If the bank will authenticate them as their records and their original records and they're theirs so we don't have to lay foundation for that by calling multiple witnesses, that will eliminate that issue.

But I just highlight it for the Court, not asking you to do anything right now, but I want to make the Court aware that could become an issue if we are unable to come into an agreement on the authenticity of the defendants' records.

MR. GLEESON: I don't anticipate that's going to be an issue.

MR. ANTHONY: Thank you.

MR. GLEESON: I have a related question, though, that --

THE COURT: And I will thank you as well, because what you have just described sounds like a reasonable process --

MR. GLEESON: Yeah.

THE COURT: -- and something that reasonable minds can come to terms and agree on. And we need to -- in light of the length of this trial, we need not lengthen it --

MR. GLEESON: Yeah.

THE COURT: -- with unnecessary disputes.

MR. GLEESON: Sorry to interrupt the Court.

I agree. There are records. We provided them. We'll be reasonable about it. And we all have lives to live. We don't want to have to bring in unnecessary witnesses to establish authenticity of records that we produced. We'll work with counsel on that.

There's a related issue that I would ask the Court to help us with a pragmatic solution, and that is both sides want to rely on bank documents that contain information about bank customers. It's dated, but it's still bank information about customers of the bank and some data about money going through the accounts, not just the Petters-related accounts. And in recognition of the fact that I think both sides are going to use them, it's not that practical, in terms of presenting the evidence, to do a ton of redacting.

What -- my suggestion to the Court is that you help us in the following sense: To the extent bank documents, and in a case like this it's inevitable they will be in evidence, we would like, you know, for practical purposes, like for a subsequent appeal, not to have it in a joint appendix. For current purposes if -- we would like to actually have them kind of maintained under seal. And in the event there's an application for public access to them, we'll respond to that appropriately, maybe suggest some redactions.

But rather than redact everything on those documents except for what we intend to focus the jury on and what my adversaries intend to focus the jury on, we would rather just, to the extent they are in evidence, have them come into evidence, but in recognition of the privacy interests of the other customers of the bank 15 years ago, have them maintained under seal.

We recognize there's a public right of access to those documents. And to the extent that access is sought, we'll deal with that at the time, but, in the meantime, if we could, as kind of pragmatic way of reconciling the needs of this -- of both sides and the jury with the privacy interests of those customers of the bank from 14 to 18 years ago, we think that's the better way to proceed.

Unless the Court has any question, I will stop there. And I have a feeling I might not have any pushback from my colleagues because they want to use the records as well.

MR. IHRIG: Your Honor, I guess we weren't aware that this was an issue.

THE COURT: Note your appearance just so that we have a clear record, Counsel.

MR. IHRIG: Of course, Your Honor. This is Peter Ihrig, counsel for the plaintiff.

THE COURT: Thank you.

MR. IHRIG: Good afternoon.

We understand what counsel is talking about, although we were not aware that this was an issue. Most of the documents that we have seen in this case that do not relate to the Petters Company, Inc. account or one of the accounts held at the bank by, you know, one of Tom Petters' entities, have been redacted. And so I guess we would really probably like to see what exhibits counsel is really talking about here so we can understand, you know, the breadth of this issue.

Certainly I don't think we have an objection to keeping, you know, unrelated parties' personal information private to the extent it's appropriate to do so, but I'm sort of, you know, fairly well-versed in the documents in this case, and this is an issue that I was not aware of.

MR. GLEESON: That's a great point, the last one, and there should be time for us to confer on it. It's kind of important because it would -- it includes things like the identities of parties on wire transfer records, the identities of parties -- you know, a business banker has an account. He is responsible for the Petters account, for example, and that account and the data in that will be contextualized. Is this account larger or smaller than other accounts?

And one way to present all that data is just the

way we have done it in the depositions and the like, where the information was kept intact on the records; but I'm just concerned, not overly so because this is dated information, but I want to turn square corners with regard to the identities of folks whose names are on those records. And as I'm saying this out loud and as I hear Mr. Ihrig -- you're Mr. Ihrig, right?

MR. IHRIG: Correct.

MR. GLEESON: -- mention appropriately we hadn't flagged this with them, it strikes me as something we ought to talk about, not on the Court's time --

THE COURT: I agree.

MR. GLEESON: -- and see if we can resolve it. Okay?

THE COURT: I agree. So, Counsel, please, I appreciate your suggestion that you confer and try very hard to resolve this issue and then bring it back to the attention of the Court with a specific indication of what the disagreement is, if it cannot be resolved, and a plan of action proposed by each party so that the Court can resolve it.

MR. GLEESON: Thank you.

MR. IHRIG: Thank you, Your Honor.

THE COURT: Okay. I think we're ready to move into motions in limine. Is counsel prepared?

MR. GLEESON: Yes.

THE COURT: Okay. The first is the motion to preclude defendant from offering evidence of investor complicity. This is plaintiff's motion.

MR. MARDER: Good afternoon. It's David Marder again, appearing on behalf of the plaintiff. Can I get some guidance, Your Honor? Would you envision me addressing all four of our motions, or would you like to do them one at a time and hear from the plaintiff and then the defendant?

THE COURT: I would like to hear a response to each motion, please.

MR. MARDER: Okay.

THE COURT: So one at a time.

So as I have it here, it's a motion to preclude defendant from offering evidence of investor complicity. I'll hear response to that motion to exclude evidence of certain recoveries, offsets, and reductions; motion to admit into evidence certain criminal convictions; motion to exclude and limit certain evidence of government investigations.

Now, motions have been filed. You don't -- and arguments have been written and made. So if there's nothing more to add, please don't feel that the Court is compelling you to speak in open court today the same thing that you have already provided to the Court.

MR. MARDER: Understood, Your Honor. There was no reply brief here, so I am going to limit my comments to addressing the things that were said in the opposition.

Your Honor, this issue has been ruled on multiple times already. The Bankruptcy Court ruled on this issue saying that deposition exhibits and deposition topics relating to this issue were out, not relevant.

And then this Court tackled this issue head on in its *Daubert* order.

THE COURT: And you're talking about investor complicity?

MR. MARDER: Yes, Your Honor.

THE COURT: Very well.

MR. MARDER: On page 27 of your report, you went into this topic in great detail and you ruled that alleged investor complicity was irrelevant so their expert couldn't opine on it. And it is our position, and I think it is true, that if it's not relevant to the case for the expert to testify about it, then it certainly isn't relevant for any other purpose.

In the opposition, the defendants identify four different reasons why they claim that this investor complicity is relevant. The first that they mention is the issue of damages. Your Honor, in your *Daubert* motion, you extensively addressed the topic of damages, and you gave

your stamp of approval to our expert's damages theory, which is that it's the -- the harm is the fact that PCI is subjected to owe money to the investors and, therefore, our damages theory is acceptable in that the measure of damages is the amount of money that PCI owes to those investors or at least owed at the time of the bankruptcy.

The knowledge of the investors has absolutely nothing to do with that measure of damages. Moreover, there is no procedural mechanism where that ever will become relevant.

In the bankruptcy, the time for challenging the amounts that are owed to these investors has long since passed. Those claims were resolved in the bankruptcy, and this Court will never have to address this because the Bankruptcy Court has already addressed it. There were resolutions of all of these claims in the Bankruptcy Court.

It is BMO's argument that that's unfair to it because BMO was not a party to those various settlements in the Bankruptcy Court. But what they don't say in their papers, Your Honor, and this is absolutely critical, is that BMO was a party in interest in the bankruptcies. As a party in interest, it had the right to object under Bankruptcy Code Section 502(a) to any of those settlements with these investors. They had the right to jump in and say, This settlement should not be approved because these investors

were complicitous, and they didn't do that.

So there is absolutely no mechanism by which the investor knowledge will ever become relevant to the topic of damages. PCI owes that money regardless of the investor complicity.

Now, there's another point that I would like to address that was in their brief that I think is critical. They identify two of the investors that they claim were complicitous. It's Lancelot and Palm Beach. And what they say is that those two entities collectively are owed $2.6 billion, yet they were part of the fraud, and then they go on and on to talk about how unfair that is.

There's a couple of points that need to be addressed in rebuttal to that, Your Honor. First of all, this figure that they've identified, the $2.6 billion, is completely irrelevant. As we've said in our papers countless times, our expert's measure of damages has to do with the net losses of those investors, meaning how much money they put in, how much money do they get back. The claims those investors made in the bankruptcy are completely irrelevant. That has nothing to do with our damages expert's assessment of damages. That's one critical point that needs to be made.

The second critical point, Your Honor, is that both of these entities, Lancelot and Palm Beach, are

bankrupt. And to the extent monies are paid from the trustee here, who is sitting with us today, and to the extent those monies are paid to Lancelot and Palm Beach, those monies are going to go back to the creditors of Lancelot and Palm Beach.

These individuals that were described as being complicits in the fraud, those people are in jail. They're not the creditors that are going to receive those monies. And, most importantly, the person who is going to receive most of this money, shockingly enough, Your Honor, is BMO Harris because BMO Harris entered into a settlement with Lancelot in which -- I'm sorry, with Palm Beach in which they reached a deal whereby they were going to receive back almost all of Palm Beach's distributions as a result of this matter.

So the notion that there's this $2.6 billion that Lancelot and Palm Beach are -- claim to be owed as part of this case and the notion that these wrongdoers are going to receive this money is simply not true.

Your Honor, I'll now proceed to their second argument, which relates to the topic of causation and substantial assistance.

Once again, Your Honor, this is a topic that this Court has already resolved. At page 25 through 27 of your *Daubert* ruling, you specifically addressed the concept of

causation and substantial assistance. And what you ruled was that proximate cause is a substantial factor test, and whether or not investor complicity was a factor was irrelevant because it doesn't matter -- it doesn't make it any more or less likely that BMO's conduct was a factor because that is the test. You already ruled on that topic, and I won't belabor that point anymore.

The third point, Your Honor, that the defendants raise, and this is a new one, they take up two pages of their brief to address Count II. And what they say is this must relate to fiduciary duty because part of the fiduciary duty claim in Count II implicates investors in that we alleged in Count II that these so-called DACA agreements, or Depository Account Control Agreements, gave rise to a fiduciary duty to investors.

But, again, what's not mentioned there is that in the Bankruptcy Court, the Bankruptcy Court Judge dismissed that part of Count II that had to do with the fiduciary duty to investors. So as it sits now, Count II is only directed to breach of fiduciary duty owed to PCI, not to those investors, and, therefore, the knowledge or complicity of investors has nothing to do with Count II.

And that, Your Honor, brings us to the very last claim, which is they claim that these relate to the aiding and abetting allegations, which is Count III and Count IV.

And they say, Well, investor complicity must relate to those causes of action. And this is just sort of a throw-away argument at the end of their brief, it's one paragraph, but I do want to address it, because all of the other statements that they make in the brief you've already rejected in your prior orders.

With regard to Count III, we do allege that there is a fiduciary duty to both PCI and its investors that was breached by PCI's officers, including Mr. Petters, Ms. Coleman, and Mr. White, and we do allege that they breached that duty both to PCI and its investors.

But, Your Honor, that claim is going to rise and fall based upon the facts about whether there was a breach of the duty to PCI. If there was a breach of the duty to PCI, then it doesn't matter whether there was also a breach of duty to the investors. And if there wasn't a breach of fiduciary duty to PCI, then for the same reason there wouldn't be a breach of the fiduciary duty to the investors.

So whether investors were knowledgeable or complicit as the defendants allege in any of this conduct is completely irrelevant to that claim.

Finally, Your Honor, they contend that investor complicity or investor knowledge has something to do with the fraud claims, but, Your Honor, in this instance they are taking contradictory positions. In their jury instructions,

they argue strongly that for the aiding and abetting claim that relates to the fraud, that the person who had to have received the misrepresentations in the underlying fraud was PCI, not the investors. And if that's the case, Your Honor, then certainly investor knowledge is completely irrelevant.

Even if the recipient of the representations could have been PCI, that's already been established in this case that the investors were misled. We have on our exhibit list, Your Honor, the summary judgment papers filed by BMO. We're also offering into evidence all of the criminal convictions. They've already agreed that the plea agreements will come in with that, and those documents all establish that investors were fraudulently induced into entering into these transactions.

So, Your Honor, in essence, there is no reason to revisit your instruction in the *Daubert* order that investor complicity is irrelevant. That is the law of the case. It's been established. And in order to overturn that, the defendants would have to identify some compelling argument that wasn't raised earlier or some reason why your prior ruling was contrary to law, and they haven't done that, Your Honor.

THE COURT: Thank you, Counsel.

MR. SPEHR: Thank you, Your Honor. Richard Spehr, Mayer Brown, for the defendant. I will address some of the

arguments made by counsel, but let me try to create a little context around what their real claims are in this case.

Plaintiff's case centers on the claim that the eight, quote, innocent investors, the beneficiaries of the BMO Litigation Trust, which Mr. Kelley is the trustee, lost 1.9 billion due to the alleged improper actions of M&I Bank in, again, their quote, actively deceiving these investors.

How do we know that? Because plaintiff asserts this innocent investor claim over and over and over in multiple court filings, including their Amended Complaint. Plaintiff makes multiple allegations that M&I misled investors about whether retail payments were being wired into the M&I account.

You need look no further than the trial brief that plaintiffs filed. Page 4, first paragraph, I will read it: (As read), "The evidence will establish -- this is their trial brief -- will also include certain communications that BMO had with PCI and its investors concerning proposed Deposit Account Control Agreements while Jambor was managing the PCI relationship. These proposed agreements were red flags because they were highly out of the ordinary in the banking industry. Based upon the draft agreements and communications with these investors over this time period, there is little doubt that the investors had been misled."

That is the factual centerpiece of the plaintiff's

case. Plaintiff also attacks M&I's conduct with respect to these DAMAs and these DACAs that were mentioned by counsel, claiming both that M&I actively misled the investors and that it withheld crucial information from the investors, according to plaintiff's theory of the case, that BMO had or M&I had no intention of executing or otherwise administering those agreements.

And now we have the proposed jury instruction added by the plaintiff in this case, which argues that there should be an instruction to the jury based upon a fraud claim or breach of fiduciary duty claim that M&I, BMO, had a duty to the investors that was breached, either breach of fiduciary duty or they committed fraud directed to the investors.

We intend to show that many, if not all, of the BMO Litigation Trust investors were anything but innocent, were certainly never misled by M&I and could not have reasonably relied on anything M&I bankers allegedly said or failed to say because -- how do we know that? Because plaintiff alleged in multiple objections in adversary proceedings, that's Mr. Kelley, the plaintiff, he alleged in multiple adversary complaints, multiple objections brought against many of these investors that they, in fact, were complicit in the Ponzi scheme. This is not a BMO fantasy. This is what Mr. Kelley argued over and over again with

respect to the investor claims.

Indeed, plaintiff, Mr. Kelley, sought to disallow the entirety of many of the investor claims due to their alleged complicity. There were multiple criminal convictions of the investors in this case, and counsel just said convictions were based upon their inducement into the Ponzi. You'll see the plea agreements, Your Honor. There's no argument that they were induced into the Ponzi. The plea agreements and Mr. Kelley's own allegations establish that they were complicit in the Ponzi scheme itself.

Finally, Mr. Kelley's expert, plaintiff's expert, Mr. Martens, and you will hear from him at trial, concluded that at least two of the investors, Lancelot and Palm Beach, were also complicit in the PCI fraud.

Let me give you some highlights, and maybe we can treat this sort of as an offer of proof, Your Honor, but I want to give you some sort of granularity around the alleged conduct of these investors by Mr. Kelley and in respect of the criminal convictions.

At the very time the Palm Beach DACA was being negotiated with M&I, Palm Beach was executing a series of note swap transactions with PCI that were solely designed to prevent PCI's default in respect of over $1.1 billion in notes that PCI owed Palm Beach at that time.

In essence, what was happening here, and you are

going to hear this investor after investor, these PCI notes are about to default. PCI goes to the investor and says, We don't want it to default. The investor doesn't want to tell its own investors that it's about to default on a billion dollars of notes, so they execute something called a note swap. Old notes are exchanged for new notes with new maturity dates. Everybody goes about their business. No disclosure that $1.1 billion in notes was about to default.

This $1.1 billion note swap that was executed in the period February 2008 is about twice the claim that Palm Beach asserts in this case or that PCI asserts on behalf of Palm Beach.

Important to the knowledge point, there is no allegation in this case that PCI or Palm Beach ever said a word about the default, the note swaps, these illicit transactions at the time they were negotiating the Palm Beach DAMA.

Exhibit 3 to the Moheban declaration contains the plea agreement of Palm Beach founder, Bruce Prevost. In that agreement, he admits several critical things. One, Prevost knew that contrary to his representations to Palm Beach's own investors between 2002, 2008, he understood that no retail payments were ever made into the Palm Beach bank account by any retailer. Think about that. Their case is built on the argument that M&I didn't tell the investors

that it knew -- it didn't know, but we'll take that as true for the moment -- that it knew that no retail payments were ever being made into these accounts. Well, Mr. Prevost on behalf of Palm Beach admits that he knew that there were never any retail payments made into Palm Beach's account by any retailer. That is a critical set of facts for the jury to hear, I would submit.

Mr. Prevost also admits in his plea agreement that the 2008 note swaps, 1.1 billion, were fraudulently designed to avoid PCI defaults. He doesn't say I was induced into the scheme. What he says is, I intentionally conducted a fraudulent transaction so that I wouldn't have to disclose to my own investors that these guys owed us 1.1 billion and were about to default.

The Palm Beach funds entered into 38 note swap agreements beginning in February 2008. That's the time of the DAMAs and the DACAs that you're going to hear a lot about at trial, which, as I mentioned, turns out to be double the amount of money that the trustee is seeking on behalf of Palm Beach in this case.

Prevost's co-founder, David Harrold, also served a multiyear jail sentence, just like Prevost, in respect of fraud committed around the PCI Ponzi scheme.

Let's talk about Lancelot.

THE COURT: Counsel? Counsel?

MR. SPEHR: Yes, Your Honor.

THE COURT: We have a limited amount of time.

MR. SPEHR: I will move through quickly.

We have heard about Lancelot. It's developed. You will see the Complaint. You will see the plea agreements, also arguably participated in the fraud.

We've heard about Acorn. We've heard about Richie. We have attached the Richie adversary Complaint in which the trustee claims that Richie also was in on the fraud.

We've heard about Elistone. That's also attached to the Moheban affidavit. I will not cover those in any level of detail.

Let me address for a second the argument that Mr. Kelley's compromise of these claims should be binding on BMO. BMO was not a party to the bankruptcy proceeding. It was not a party in interest to the bankruptcy proceeding. It had no ability to object to the compromise claims that Mr. Kelley reached with these investors.

The jury, Your Honor, should be allowed to determine whether the investor claims should be invalidated as this Court made a very clear ruling that the measure of damages in this case was PCI's, quote, inability to repay creditors. If the transactions executed by those creditors were fraudulent, there is no basis for that claim to be

asserted in this case.

Counsel also argues that the Bankruptcy Court made a ruling that all investor complicity facts should be out of the case. The bankruptcy Court didn't have the power to make that ruling, Your Honor, and, in fact, Judge Sanberg did not make that ruling. In fact, Judge Sanberg ordered discovery against one of the eight investors, Interlachen. So whatever investor discovery may or may not have been permitted in the Bankruptcy Court, the Court made no global ruling that investor culpability was out of the case.

Plaintiff's final argument is that it would be unfairly prejudiced if investor complicity is introduced at trial. That argument should be rejected out of hand, I submit.

The argument translated is simply an attempt to ensure that this case devolves into a one-sided presentation by plaintiff enabling it to attack BMO and to ensure that no contrary evidence is offered to the jury.

There is nothing prejudicial, Your Honor, about providing to the jury a fulsome understanding of what these investors were up to and when they were up to it in the context of their communications with M&I.

I will leave with this, Your Honor, and I apologize for going so long, I really do. The fact pattern here is pretty simple. Ponzi schemers, including a number

of the eight investors, loaned money to another Ponzi schemer, PCI. Under those circumstances, I submit to the Court that it would be manifestly unjust to permit a damages recovery based solely on Mr. Kelley's unilateral and unchallenged claims determinations without proper vetting before the jury.

And I thank Your Honor.

THE COURT: Response, please.

MR. MARDER: Your Honor, may I have one minute in rebuttal before moving on to the next?

THE COURT: You may.

MR. MARDER: Thank you, Your Honor. I just want to address three points that were made by BMO's counsel.

The first is that BMO most certainly was a party in interest in the bankruptcy. And if there's any doubt about that, you can just look in the bankruptcy filing. They were -- had an adversary proceeding brought against them in a case. And as a party in interest, they had the ability to object under Bankruptcy Code Section 502(a).

Second of all, all of the arguments that BMO's counsel made about the investor claims all have to be viewed in the prism of how they characterize our case. And they said it best when they said these are claims that PCI asserts on behalf of Palm Beach. We are not asserting claims on behalf of any investors, Your Honor. We are

asserting claims because the trustee has stepped into the shoes of PCI and PCI has been damaged by virtue of these claims.

Finally, Your Honor, all of these arguments that Mr. Kelley made in the underlying proceedings about whether there was complicity that they want to use against him, those were allegations that were made. Those cases were all settled. The settlements were approved by the Bankruptcy Court and BMO had the ability as a party in interest to object to those, and they did not.

So those are the only points I want to raise. And with that, Your Honor, I will move to the next motion that you wanted to hear, or maybe you don't want to hear, but you are obligated to hear, is the argument on the offsets and reductions.

This, too, again, Your Honor, is an issue on which you very carefully thought about the issues, went through the issues one by one, and ruled very clearly in your *Daubert* order that offsets and reductions were irrelevant. And because they're irrelevant for the expert's testimony, they're also irrelevant for the case at large.

They are irrelevant for multiple reasons, and first of all I'll talk about the recovery by creditors. As you stated in your *Daubert* order at page 29 and 52, any recoveries by creditors are irrelevant because they're not

the party here. The party here is PCI, who is seeking damages for its own harm.

And as you correctly ruled in your *Daubert* order, the *Emerald Casino* case is directly on point because there, as here, the party conflated the issue of distribution with recovery, and very clearly that case governs and is persuasive for the very reasons that you already articulated in the *Daubert* order.

In their opposition, BMO argues that that case is distinguishable. Even though you have already ruled on this, Your Honor, that it's directly on point, they say it is distinguishable because the theory of recovery there was the dissipation of assets. But I'd ask Your Honor, if you look at that case, you will see that nothing about the Court's rationale in that opinion has anything to do with what -- the theory of recovery. The rationale in that opinion was that the trustee's recovery has nothing to do with identifying who gets what when the estate distributes the assets, and that rationale has nothing to do with whether the theory of recovery was dissipation of assets or not.

The second critical point here, Your Honor, with regard to offsets and reductions, has to do with this issue of the time period. And on two occasions, Your Honor, in your *Daubert* ruling you very clearly went through this issue

and on page 28 and on page 51 of your *Daubert* order, and you very clearly explained why it was that this time period of the time that the case was filed is a critical one and that offsets and reductions after that time period were not relevant.

We also directed you to the relevant case law and the statutory authority in our brief, which I'm not going to belabor here. So, Your Honor, there's nothing to address there. The defendant simply ignores that part of your ruling.

Third, Your Honor, is that BMO is clearly wrong about double counting with regard to the issue of any recoveries by the trustee.

You also, in your opinion, Your Honor, went through this very carefully, and you explained on page 52 to 53 that those actions brought by the trustee, which were avoidance action by and large, but also involved some criminal and forfeiture type proceedings, those actions were not for the same harm.

And so all of the case law they cite and all of the arguments they make, Your Honor, just ignore that part of your ruling. You have already ruled that these actions that were brought for the trustee were on different legal theories for different harms, and there's no reason to revisit that.

Finally, Your Honor, I would like to address the collateral source rule. In your ruling, you addressed the collateral source rule at page 29 through 31 and 52 and 53, and you said that the rule applies, and you very carefully set forth your rationale.

BMO now asks you to reconsider that in the form of an opposition to this motion in limine. And what they say is you should reconsider that because that rule doesn't apply where the two different cases are -- relate to the same tort liability.

But, Your Honor, this is the same issue that you already addressed when you were talking about the double counting in the trustee recoveries. As before, when it had to do with that topic, you carefully went through the different causes of action and showed how they were for different theories and different harms. That very same rationale undermines the arguments that the defendants are making.

They reference various actions that they say the collateral source rule shouldn't apply to, but when you look at them, Your Honor, they are the very same actions they keep repeating. They are all these actions relating to preferential transfers and criminal restitution and various receiver actions for forfeiture and the like, none of which are for the same tort liability, and, therefore, your

rationale and your position that you took with regard to the collateral source rule still applies.

And, once again, Your Honor, I don't want to miss the point of the doctrine of law of the case, which is you have already made these rulings. And for BMO to revisit these rulings, they would have to identify some grave error in your prior rulings, some new case law, some new facts that they couldn't have pointed out before. And, Your Honor, they've done none of that. All they've done is rehash the same arguments that they made in opposition to the *Daubert* again and again and again.

So for those reasons, Your Honor, we would ask that you grant our motion to exclude the evidence relating to offsets and reductions.

THE COURT: Thank you, Counsel.

Any response?

MR. YOUNT: Thank you, Your Honor. Josh Yount for BMO Harris Bank.

Because your order from last week addressed offsets, recoveries, and reductions, we're going to rest on our brief for the points that were considered in that order, unless you have questions for us on that.

But there are two questions -- two issues that we want to raise for clarification purposes, and they build off of one of the last points that Mr. Marder raised.

And so the first is whether BMO can offer evidence of payments from those subject to the same tort liability as BMO. The collateral source rule in Minnesota, Restatement Section 920A, Sub 1, allows offsets for payments by those subject to the same tort liability as the defendant.

The estate recoveries identified by BMO and its expert fit that description. Most obviously that's true for Tom Petters, Deanna Coleman, and Robert White. In the Complaint in this case, they are alleged to have committed torts that M&I aided and abetted. No clearer instance of joint tortfeasor could be possible.

The same is true for other individuals who alleged -- I'm sorry, so other individuals who joined the Ponzi scheme and contributed the same liability. So that would be folks like at the phony vendors, Frank Vennes, others. I won't go through all the names. And we submit that it also includes investors whose alleged misconduct propped up the Ponzi scheme for years and years who also have liability for fraudulently depleted assets.

Now, the trustee says that those cases against the investors, the winning investors, those were different theories and different harms. The harm is the same. It's fraudulently depleted assets. That is the theory of harm in this case. That's the theory of harm behind a fraudulent transfer claim.

And the fact that they are different legal theories, that doesn't matter. Under Minnesota law, a double recovery exists when it's the same harm but different theories of liability. That's how Minnesota law applies its double recovery rule. And so I would submit that BMO should at least have the chance to prove at trial what recoveries came from payments by those subject to the same tort liability as BMO is alleged to be.

The second issue I want to address, Your Honor, is whether BMO can offer evidence of assets that PCI obtained pre-bankruptcy in the transactions allegedly depleting PCI's assets. Right? So in connection with the fraudulent depletion of PCI's assets, PCI received certain assets in return. So, for instance, PCI and the related debtors, who have been consolidated, purchased companies, like Polaroid, which has value and had value at the time of the bankruptcy.

They also, even in making fraudulent transfers to investors, received causes of action against those investors to recover the fraudulent transfers. And, again, PCI had these assets when it entered bankruptcy. So this would not be a post-bankruptcy asset.

And under established Eighth Circuit law, when a debtor receives value for a fraudulent transfer, that value must be deducted from the damages that are assessed in a tort action on behalf of the debtor. That's one of the main

holdings in the *Senior Cottages* case.

I think I can stop there unless Your Honor has questions about any of the points Mr. Marder raised that you would like me to additionally raise -- or address or anything I said that you have questions about.

THE COURT: I have no questions. Thank you, Counsel.

MR. YOUNT: Thank you, Your Honor.

MR. MARDER: Your Honor, again, just very briefly I would like to rebut those points.

The first is counsel for BMO said he would like you to clarify a few points, but this is not a request for clarification. This is a request for you to overturn your prior ruling where you very clearly stated that all of the offsets and reductions were irrelevant.

Second of all, Your Honor, his whole first argument about the collateral source rule is utterly irrelevant because the collateral source rule in your *Daubert* motion ruling was an alternative reason why these monies were irrelevant. Before you even got to the collateral source rule, you ruled that these were irrelevant for all these other reasons, such as the fact that there was no double counting and the fact that the ruling in the *Emerald Casino* case and the time period and all those other issues before you even got to the cholesterol estoppel.

So even if there was an argument on collateral estop- -- I'm sorry, not collateral estoppel.

THE COURT: Collateral source rule.

MR. MARDER: Right. Collateral source rule. Sorry.

So even if they were correct about the collateral source rule, it wouldn't affect it because you already ruled that these things were irrelevant for other reasons.

Second of all, their duty here as the proponents of the evidence would be to establish cases where the trustee received recovery which clearly were for the same tort liability, and they haven't done that. They have just thrown a laundry list of cases into their brief without really laying out what these cases were for. The ones that they've identified either, and as I can see, fall into three categories. Some of them that they mention are -- like *Vennes* and the *Fry* case have to do with criminal restitution. They are not even civil cases. They have a bunch of these fraudulent transfer cases, Your Honor, that you've already said regardless of the theory of liability are for a different harm. And then they throw in some actions that the receiver took. We're not even talking about a recovery by the trustee. We're talking about receiver recoveries.

So these actions -- the duty upon BMO would be to

actually identify some other cases and tell you why they're subject to the same tort liability, but they haven't done that. But as I said earlier, you don't even need to get there because the collateral source rule was just an alternative ruling -- basis for your ruling.

So with that, Your Honor, I'll just move on to the next one on the list.

THE COURT: Motion to admit into evidence certain criminal convictions.

MR. MARDER: Yes. With respect to that one, it's actually a fairly simple issue to resolve. The defendants agreed to the entry of the plea agreements. They agree to the entry of the judgments. The only issue has to do with this instruction, and what they've done is given you an alternative instruction to provide that's different from ours.

We actually are okay with their alternative exception as long as a few small edits were made, and I will just tell you what they are, Your Honor.

In BMO's proposed instruction, they -- on the third line down, they say that there was -- the PCI employees furthered a scheme to obtain billions of dollars in money and property. If you look at the relevant plea agreement, Your Honor, which is the PCI plea agreement, on page 2, it's Exhibit I to the declaration, and also on page

3, they have omitted a particular word that's very important. The actual plea agreement says, "Furthered a scheme to defraud and obtain billions." They have taken out the word "defraud" there because they don't like it, but that's not the purpose of this exercise. The purpose of this exercise is to accurately describe what is contained in those plea agreements.

And they've omitted those words, and we would ask that those be added on the third line of their instruction, so that it would read, "furthered a scheme to defraud and obtain billions of dollars" as it says in the plea agreement.

Second of all, Your Honor, and this is a similar one, the first sentence of their third paragraph, they take out certain key words that were in the plea agreement. Their version says, "The scheme used false statements, false representations, and material omissions to induce lenders to loan PCI billions of dollars."

If you look at the PCI plea agreement, which is Exhibit I to the declarations, on page 2 they have omitted a very important word there as well. It says, "to fraudulently induce investors." They took the word "fraudulently" out, and we would request that it be put back in so that it reads, "material omissions to fraudulently induce investors" because that's the language that's used in

the PCI plea agreement.

Also, Your Honor, they cut out some language at the end of that sentence. They say -- it should read, as I said, "Fraudulently induced lenders to loan PCI billions of dollars," and they took out the words "based upon the representations and omissions" -- they took out those critical words, and those are found also in the PCI plea agreement, Your Honor, on page 2, and in the Coleman plea agreement as well. It's a very critical concept that when they fraudulently induced these lenders to loan the money, that they loaned the money based on the representations.

The last change, Your Honor, that we would recommend is that there was a sentence that we had in our version that they've cut out, and that sentence read, "In connection with the fraud, Petters or his co-conspirators caused money to be transferred to and from PCI's bank account at M&I."

And they removed that from their version. We would ask that that be added back in, and the reason is very simple. If you look at the underlying papers, that sentence is clearly supported. If you look at the verdict against Mr. Petters, and specifically Counts 7, 16, and 17, there it clearly states that the monies were transferred to and from PCI's bank account. Similarly, in the PCI plea agreement at page 6, which is Exhibit I to the papers, it also has that

language.

So, in essence, Your Honor, there's very little for you to resolve in connection with this. They've agreed that the plea agreements come in. They've agreed that the judgments come in. And we just have a few edits that I've mentioned that are clearly derived from the underlying documents, which is essentially words that they have omitted.

THE COURT: Thank you, Counsel.

Any argument on this matter?

MR. GLEESON: I think if I get to see the suggestion that's made by counsel in writing, we can probably take it off your plate.

THE COURT: I would ask that you take it off my plate --

MR. GLEESON: I figured --

THE COURT: -- if you can, and so please confer and let the Court know within two days whether this matter is still a live matter.

MR. GLEESON: Will do.

THE COURT: It sounds like it is likely to be able to be resolved.

MR. GLEESON: Yes.

THE COURT: And I appreciate the fact that counsel agrees.

MR. MARDER: Your Honor, by 7:00 p.m. I can send to Mr. Gleeson and his colleagues a redlined version with our suggested changes.

THE COURT: Okay. Very well. Thank you. So ordered.

MR. MARDER: Finally, Your Honor, I would like to address the motion to exclude and limit certain evidence relating to government investigations.

And, once again, Your Honor, we are not writing on a clean slate here. You have already ruled on these issues in connection with your *Daubert* motion ruling.

What I would like to do, Your Honor, is take the arguments slightly out of order because there's one that's particularly important. There is a witness, Mr. Janczak, who is an employee of BMO who testified that some unidentified person from the Federal Reserve told Mr. Janczak sometime after the fraud was revealed to the world that the Federal Reserve looked at this and found nothing that they think BMO should have done differently.

In your *Daubert* ruling, Your Honor, and if you look at page 18 of your opinion, you cite this testimony specifically in the footnote, and you ruled that this testimony is irrelevant for the expert to testify about. And the reason is that you can't draw conclusions about what BMO thought or knew based upon what some other person

thought or knew. And, therefore, Your Honor, this testimony is absolutely irrelevant and should not make its way to the jury.

Equally important, Your Honor, is this language is clearly hearsay. They want to put on a witness to testify that somebody else told them that they looked at this conduct and they thought it was okay and that person was a government employee.

That's only relevant if the truth of the matter asserted is true. They say that the only reason they're putting this into evidence is to show the effect on the listener, and, therefore, it's not for the truth of the matter asserted.

But, Your Honor, the effect on the listener is completely irrelevant to this case. Whether Mr. Janczak listened to what the government employee said after the fact and thought, Oh, that makes sense, is not at issue in this case. It simply doesn't matter. The issue is what BMO knew or didn't know back at the time. It has nothing to do with whether Mr. Janczak, after the fact, upon hearing something that a government employee said, thought that everything the bank did was just fine.

So for two reasons, Your Honor, that testimony must be excluded. Number one is it's completely irrelevant as you've already ruled, and, second of all, it is complete

abject hearsay.

The second issue with these government investigations are these various notes from the interviews by the FBI. Apparently there was an interview in 1998, another one in 2003. We know very little about what the FBI was investigating.

In the first one, we have a one-page typewritten note that's narrowly focused on a transaction with someone named Mr. Hettler. And in the 2003 notes, the FBI interviewed Mr. Coleman and Mr. Petters and the notes are limited to some sham vendor called ASM.

Now, remember, Your Honor, our theory in this case is that the business model was allegedly that retailers would be wiring money to the account and -- in payment for these electronic -- electronic products. In fact, the evidence is going to show that 70 to 80 percent of these incoming wires, which accounts for billions of dollars, were from the two wholesalers that PCI was supposed to be buying goods from and that they never actually received any money from the retailers.

Now, for this test -- for this interview notes -- for these two interview notes that have been mentioned to have some tendency to prove or disprove anything of consequence, then they would have to show somehow that the FBI was looking at the same issue that they were looking at,

had the same information, had the same motive, and made a decision not to pursue this or, worse still, didn't even notice the wrongdoing. But we have no idea whether that happened. Based upon these two notes, all we know is that the FBI had some narrow investigation that they looked at and didn't pursue it.

Under your *Daubert* ruling, you've already held that that type of information is irrelevant on page 18 because you can't draw conclusions about one person's mental state from the mental state of another.

And even if you could, Your Honor, think of the Rule 403 issues here. To have this jury hear that the FBI thoroughly looked into this, which isn't true, and didn't do anything about it or didn't notice it and therefore the bank shouldn't notice it either, that would be extremely prejudicial because the jurors, upon hearing that the government gave its alleged stamp of approval to this or didn't notice anything, would be highly prejudicial to our case.

So, Your Honor, not only to 403, even if this had some probative value, but we would say even under 402 this has zero probative value because there's no showing that anything that the FBI did or didn't do is remotely analogous to anything that was done by the bank.

Similar categories of documents are these FBI --

I'm sorry -- these FRB Chicago exams. This is the Federal Reserve Chicago office. And there are some wire transfer records where the FRB Chicago, the Federal Reserve in Chicago requested that the bank provide certain wire transaction spreadsheets.

Your Honor, these spreadsheets are massive. They have thousands and thousands of transactions in them, and only a tiny number of those transactions relate to BMO. We have no evidence that anybody at the Federal Reserve looked at any of these transactions that related to BMO. There's no evidence of that, and we'll never know that.

We don't know what the Federal Reserve did with those documents. We don't know what conclusions they drew, and we don't know what they decided to do with them because it's a complete blank slate.

This testimony is already subject to your *Daubert* ruling that you can't draw conclusions on one person's mental state from the state of another. Whether or not the Chicago FRBs looked at this and decided that they weren't going to pursue it or if they didn't notice it, doesn't have anything to do with BMO's mental state. And even if it did, they can't prove that the FRB Chicago actually looked into this material because all we know is that they were given a big pile of spreadsheets and we don't know what they did with it.

And then, once again, Your Honor, there's the terrible 403 problem that we would suffer from -- prejudice from.

BMO makes two arguments that I will address briefly, Your Honor, and that will be the end of this argument.

BMO says that these documents are relevant for two reasons. First of all, they say, Well, Judge, this undercuts the plaintiff's argument that anyone with access to the transaction history would have come to a conclusion of fraud.

But, Your Honor, that has never been our argument. We don't say simply the fact that BMO had access to the transaction history means that they would have come to the conclusion of fraud. If you look at our trial brief and all the papers we submitted, our case is much more significant of that. There were red flags after red flags after monthly alert after monthly alert after having AML investigators review these transactions in detail, we have all of the various pieces of evidence that I am not going to belabor here and repeat here that are set forth in our trial brief. We are not simply arguing the mere fact that they had the transaction history was enough for them to come to the conclusion of fraud. They had to know, for example, the business model.

THE COURT: Counsel, I am going to stop you here.

MR. MARDER: Uh-huh.

THE COURT: And I am going to also just advise both counsel, I have read your written submissions, and so we do not need to have a recounting of those written submissions. We have a limited amount of time. We have several motions more.

MR. MARDER: Understood, Your Honor. That concludes my argument.

MR. MOHEBAN: Your Honor, Keith Moheban on behalf of BMO, and I will certainly take heed to what you just said. I really want to just make three points.

I want to talk about the *Daubert* -- your *Daubert* decision, because I think it completely supports our position on this motion. I want to talk about this is a relevance objection and that the threshold for relevance is exceedingly low, and then I want to talk about sort of a goose and gander argument, because what you are hearing here is not that these documents or this information or that law enforcement involvement is irrelevant. You're just hearing that they don't like the parts that are helpful to the bank, and they want you to exclude half of that evidence and leave the other half.

Let me start with the *Daubert*. So what I read in your decision was you did not favor the notion of experts

giving opinions about what M&I people would have thought or done based on what other people might have thought or done. I got that.

But this evidence is about what M&I people did. This is their actions, which you said is the probative thing for a jury to consider. So we have these Federal Reserve examinations. I think the first ten witnesses on the witness list for the trustee are AML exam people, people at the bank who were working in an area where they are reviewed by the Federal Reserve.

And I think a good portion of the evidence that the trustee wants to submit is how M&I interacted with the Federal Reserve and what kind of feedback they got. And to the extent that the Federal Reserve was ever critical of the bank, they certainly think the jury should hear that.

But when other things happen to provide a full context of that relationship or when the Federal Reserve says something laudatory about the bank, such as, we wouldn't have seen you do anything different than what you did with respect to these accounts, they want those excluded. That's the goose and gander problem, and that's the relevance problem.

If the Court is going to have the jury hear evidence about how M&I interacted with the Federal Reserve, including all of these examinations that the trustee is

going to put in, then the bank ought to, in fairness, to round out the entire evidence here, be able to talk about the submittals that they made, these wire transfers, the interactions that they had with the Federal Reserve. We're not going to put in evidence of conclusions of what the Federal Reserve concluded. The jury can make that conclusion, but they ought to have the facts.

And with respect to Mr. Janczak and the fact that he had this response from the person at the Federal Reserve is absolutely relative -- they have a huge contention here about punitive damages. They think that -- at some point they are going stand here and ask the jury to award punitive damages because of the conduct of the bank which includes the bank's failure to make corrective measures.

And one of the reasons Mr. Janczak said we didn't change the AML program is because we were told by the fed that our AML program was fine. So there's -- I mean, we are talking about relevance here. The very low standard. Should the jury hear the evidence.

So then we get to the DOJ subpoena, right? This is, again, facts involving M&I. M&I was sent a subpoena from the Department of Justice in 2003 for records. Now, granted, we don't know every last detail about what happened with that subpoena, just like we don't know every last detail of all these things, which are now ancient history.

But should the jury hear it? Trustee doesn't say you should exclude it entirely. What the trustee says is, Well, we want you to use it as a red flag. We want to you tell the jury this is relevant because it put M&I on notice that somebody was investigating Petters.

And, rather, I think the right answer for that is to say, We are going to put this evidence in. The jury can reach its conclusion, along with all the other evidence that it's provided.

Again, they're not asking to exclude it --

THE COURT: When you say "we are going to put this evidence in," what is "this evidence"?

MR. MOHEBAN: The grand jury subpoena. Both parties believe it's relevant. I think the issue before you is whether you should give some kind of limiting instruction that tells the jury what they should make of it. And I'm simply saying let the jury decide, let them hear all the facts and circumstances, whatever evidence there is about the subpoena.

This isn't an issue of excluding evidence. This is really a request for a limiting instruction to tell the jury what to think, and that's not how courts work. Let the jury make its own conclusion.

And then, lastly, I will just talk about --

THE COURT: What is the relevance of the --

MR. MOHEBAN: I'm sorry?

THE COURT: What is the relevance of the evidence?

MR. MOHEBAN: Of the subpoena?

THE COURT: Yes.

MR. MOHEBAN: Well, it indicates that there was some type of an inquiry. We know sort of what was asked for. There are some records that go back and forth. We know that there was a bank response, and we know that as a result of that, this Ponzi scheme went on for five more years. So there are inferences the jury can draw as to those facts.

We're not telling, you know -- we're not asking for an instruction as to what they should -- how they should receive that evidence, but we think it is -- your *Daubert* order was saying we should talk about what was said and done, and here is a direct activity that M&I was involved in that relates to an investigation of Petters. It's part of the whole facts scheme here, that the contention is that M&I was aiding and abetting in a fraud.

What we know is that they were submitted -- they were presented to a grand jury. They made some kind of response. Life went on. Nobody indicted anyone at M&I. Whatever information was provided didn't result in exposing the scheme at that time.

They're relevant facts, and the jury ought to hear

it and they can decide what to make of it, along with all the other facts they are going to hear.

THE COURT: You said they're relevant. They're relevant to what?

MR. MOHEBAN: Relevant to what M&I knew about the information they were asked to provide by the Department of Justice.

And it's very similar to the situation in 1998 and in 2003 when we know that there were other investigations made by Petters -- about Petters, I should say, by the government, and we know that we have notes of those. And you're going to have in this courtroom Deanna Coleman, the whistleblower of the Ponzi scheme. She will appear and she will testify these are notes about her interviews. And to the extent that she concealed the Ponzi scheme to law enforcement at that time is corroborative of our case, which is that she concealed it from us too.

And, again, these are factual points of reference that a jury can consider and can make their own conclusions as to what to make of it. So the idea that these -- some of the most critical pieces of evidence that we have here about what -- you know, evidence of Deanna Coleman and Tom Petters concealing the Ponzi scheme is contained in these notes, and it's corroborative of our view that they concealed it from us as well.

So the other thing is that these are witnesses that are going to come before you. You can make these decisions in the context of the evidence that's presented. I don't think any of these pieces of evidence have to be decided upon at this time, and it may be useful for you to have more context in the case in deciding.

But the last thing I'll say about this is don't let half the evidence in. Don't let them be able to put in Federal Reserve or other evidence just when they think that it helps their case and then allow them to have the things that help us be excluded. Thank you.

MR. MARDER: Your Honor, you will be happy to hear I have nothing further on that motion.

THE COURT: We are ready to move to defendant's motions then?

MS. GITTES: Thank you, Your Honor. Susan Gittes for BMO. So defendant's first motion is for exclusion of plaintiff's use of a 2018 settlement under FIRREA that BMO entered into in 2018. And I want to be respectful of the Court's time, but just very briefly because I think the way the *Daubert* motion came in, there's a little bit of confusion as to exactly where this stands.

So we argue in our motion plaintiffs can't rely on the settlement for the truth of the matter asserted there sort of to prove its claim that BMO is liable in this case.

There are a number of reasons laid out in our brief that I don't need to rehash as to why such a settlement should be excluded. It's not relevant. There was no admission. Under Federal Rule of Evidence 408, there's a strong policy against admissions of voluntary resolutions. 403 and hearsay.

So to get to the heart of where I think we stand today, plaintiff's opposition claims the motion is moot because Your Honor's ruling on the *Daubert* motions already excluded any evidence in this regard. And I think -- and this dovetails with Mr. Moheban's conversation with you a few minutes ago -- they cite to page 18 of Your Honor's *Daubert* decision and claim that any evidence of sort of anything in this -- that BMO did nothing wrong is excluded on that basis.

And in reading page 18 of your order, that concerned Mr. Grice, defendant's AML expert's ability to opine on the state of mind of both M&I employees and of third parties like the FBI. The way we read your decision, Your Honor, is that it did not exclude the underlying facts to the extent otherwise relevant here, and I think Your Honor's decision mentioned something to that effect, that ultimately the opinions and inferences that were impermissible in Mr. Grice's opinion are for the jury to decide, not a proper topic of expert opinion.

So defendant does intend to offer evidence in this regard, including that, you know, no one at M&I was criminally prosecuted. We'll have witnesses from M&I, and they'll each testify they were never criminally prosecuted. There will be no evidence, and we can point that out.

In addition, that the scheme, you know, evaded detection for many years.

THE COURT: Why is it relevant that no one was criminally prosecuted?

MS. GITTES: Your Honor, I think here, where we're dealing with the knowledge of Bank of Montreal employees and where you have federal investigators having spent years going through all of the things that happened, and where we see that there are others that were criminally prosecuted here, like Deanna Coleman, the absence of that is probative, is relevant to whether the bank should have done something different here.

THE COURT: How so? And what would you point to? What case law would you point to that supports that?

MS. GITTES: I don't know that I specifically -- I think it goes back to some of the arguments of Mr. Moheban. I am happy to look, Your Honor. I think our -- it's more the commonsense point that the liability here, whether BMO -- the questions presented by plaintiff's claims are did M&I employees know about the conduct. I think our view is

no. And, you know, a number of different entities all went back through these records in great depth. And the fact that, for example, Mr. Jambor, one of the witnesses that you'll hear about, in fact, was a witness in the prosecution against Mr. Petters and was never prosecuted is probative. I mean, plaintiffs can point out both parties can make arguments as to what probative value the jury should weigh on it, but I think -- and I would also worry --

THE COURT: I'm concerned about the prejudicial effect, and so if we weigh probative value as to prejudicial effect, the prosecutorial discretion exercised has what probative value in this instance?

MS. GITTES: Well, Your Honor, I think I would say it -- somewhat respectfully, I think I would flip it around. I think we're going to have a situation --

THE COURT: Answer my question, and then you can flip it as much as you want.

MS. GITTES: Fair enough, Your Honor.

In our view, that has probative value to, in fact, whether anyone at the bank was -- did have knowledge of the scheme. And I think it would be just as prejudicial -- and, again, we're not saying that they did -- I think plaintiff will be, and I am sure they will, make many arguments about, you know, the lack about -- all the things that the bank did wrong. I don't think we can argue, you know, and if we do,

they will be able to rebut it, that everything was perfect. I'm not saying that. I'm saying the lack of a criminal prosecution here, especially in the specter of a criminal scheme, is I think a core question that we can't avoid.

And now to flip it, I think it would be prejudicial to Bank of Montreal if we're not allowed to say that, because I think otherwise you could have -- you know, where you have this unknown for the jury to speculate about whether there was any criminal prosecutions here, I think that's a question that, frankly, is going to come into the jury's mind here.

Plaintiffs will be free to argue that they -- you know, as to what conclusions, if any, should be drawn from that, just as we will. But I think, Your Honor, given the specific nature of the scheme here, it would be unfair and unduly prejudicial to defendants not to be able to point out that fact.

And so, you know, going back to FIRREA, our view is that we should be permitted to make those arguments. Also that the FBI didn't detect this scheme until, as Deanna Coleman will testify, she, you know, brought the scheme to the government's attention in 2008. That speaks, in our view, to the complexity of the scheme, to, you know, whether the Bank of Montreal and M&I should have been able to figure it out.

And so, in our view, none of that should open the door, to the extent that's I think where the plaintiffs would be, is none of that should open the door to the settlement. There are strong reasons why settlements of this kind have a great risk of prejudice, limited probative value. But I think also, Your Honor, to the extent that the door is ultimately opened -- or to the extent plaintiffs want to make that argument down the line, we can consider that as we go. It's not to say there's nothing we could ever put forward that could open the door. I think the question is dealing with those instances as they arise.

I think that's all I have, unless Your Honor has any other questions. Thank you.

THE COURT: I do not. Thank you, Counsel.

MR. MARDER: Sorry, Your Honor. May I proceed?

THE COURT: You may.

MR. MARDER: Your Honor, I will just be very brief here. BMO's counsel indicates that in your *Daubert* motion it was their understanding -- in your *Daubert* ruling, it was their understanding that what you ruled was that the expert could not testify on people's state of mind but the underlying documents would be admissible.

But, Your Honor, they are only reading half of your rationale. You, on page 18 of your order, gave two different reasons why this Janczak testimony was

inadmissible. One was because the expert shouldn't be testifying based on state of mind, but then in the last sentence of the paragraph there, you say, "Moreover, the knowledge or mental state of one person or entity has little or no probative value as to the knowledge or mental state of another person or entity."

So your ruling was based on two things: First, that the expert couldn't testify as to state of mind; and, second of all, this type of testimony that they are trying to rely on where the government says we don't think you did anything wrong has no probative value.

So with that understanding, Your Honor, because it's our understanding that the Janczak testimony about what some unnamed official told him is irrelevant, we stated in our papers that this was moot.

The only purpose of us putting on this FIRREA settlement was to rebut what their expert was going to say. Their expert was going to say that the government looked at it and said it was okay and didn't -- decided not to pursue anything.

But, Your Honor, that's simply not true. What the other side of the story is they did decide to pursue it. They were going to bring this action, and the only reason they didn't bring this action is because BMO settled the case with the government for $10 million with regard to

their wrongdoing on how they handled this account.

So if the Janczak testimony were going to be admitted into evidence, then we would offer this settlement for the sole and limited purpose of rebutting their argument that the government looked at it and decided not to do anything about it. But because this Janczak testimony is out, as we understand your ruling, then this is, in fact, moot, and assuming you ruled that the Janczak testimony is out, this is moot.

If you were to rule that notwithstanding the relevance problems and notwithstanding the hearsay problems somehow this Janczak testimony gets in, then this would be admissible for the limited purpose of showing that their argument is wrong, that the government didn't look at this and decide it was okay. In fact, the government pursued it and then dropped it after they settled the case for $10 million. That's not hearsay. That doesn't fall within Rule 408 because it's not for any purpose prohibited by that rule and would be otherwise admissible.

But, Your Honor, it seems so clear to us what you ruled, and that this Janczak testimony is inadmissible. For that reason, we said we thought this was moot.

That's the extent of my argument, Your Honor.

MS. GITTES: Just briefly, Your Honor. I think -- I guess to counsel's point, I think some of this depends on,

you know, if one thing comes in, then another, and so I do think we can sort these out probably more ably as the trial goes on.

The other thing I would just say about relevance is to make one additional point. One of the key witnesses in this trial, likely for both sides, will be Deanna Coleman, who was a co-conspirator of Mr. Petters and ultimately told the FBI about the scheme.

Ms. Coleman never pointed the finger at M&I, and I think that's another powerful piece of evidence that we will want to elicit, that again here is probative of the fact that M&I didn't have knowledge of or kind of participation in this scheme. She cooperated with the government. She had every incentive to give up anyone involved in the scheme. She gave up plenty of people who were. She never pointed the finger at M&I. And so that's just one additional piece of context as we think about kind of how the jury will be processing information on the situation as a whole.

Thank you.

THE COURT: Thank you, Counsel. We're going to take a recess at this time and we will be ready to resume at 3:25.

(Recess taken at 3:09 p.m.)

* * * * *

(3:25 p.m.)

IN OPEN COURT

THE COURT: Please be seated. Counsel, we are ready to resume. We will have a hard stop at 3:50. Okay?

MR. YOUNT: Thank you, Your Honor. Josh Yount again on behalf of BMO Harris Bank.

We have moved to exclude any evidence of M&I duties to investors or any breach of such duties as irrelevant, unfairly prejudicial, and confusing.

It's irrelevant in the first instance because the plaintiff cannot enforce duties that are owed to investors. The plaintiff represents PCI in this matter and not its investors.

M&I -- beyond that, M&I's duties to investors can't be the basis for the breach of fiduciary duty claim against M&I because that part of that claim was dismissed, and they can't be the basis of the trustee's other claims because those are claims that arise from duties owed by PCI management, not by M&I.

Now, the trustee says that this evidence is relevant to M&I's scienter, but what M&I knew and whether those facts amount to actual knowledge or bad faith does not depend on whether M&I was under any duty to tell investors those facts or failed to fulfill such a duty.

That evidence is also not relevant to the

substantial assistance element of an aiding and abetting claim, as the plaintiff claims. Substantial assistance requires affirmative acts under the *Witzman* case from the Minnesota Supreme Court. And a failure to disclose is not an affirmative act under the *American Bank* case from the Eighth Circuit.

Beyond the relevance problems, this kind of duty evidence about M&I's duties to investors would create tremendous amount of unfair prejudice and jury confusion. The jury would be confused, I think, about what the basis for liability against M&I would be, whether they could impose liability on M&I for M&I not fulfilling some duty to an investor.

Allowing in this evidence would also create a considerable amount of collateral litigation as the parties sparred over whether M&I had disclosure duties to investors, when those duties arose, and which investors were owed duties.

And, finally, the plaintiff has been quite inconsistent on investor evidence. The plaintiff, as you know, successfully opposed investor discovery on the idea that investor knowledge and conduct is irrelevant. Plaintiff should not now be able to turn around and offer evidence about duties to investors, which would make investor knowledge and conduct highly relevant.

In fact, I noted one thing that I wanted to refer back to in Mr. Marder's first argument. He said that it doesn't matter to the aiding and abetting breach of fiduciary duty -- I'm sorry. He said that the aiding and abetting -- any aiding and abetting of breach of fiduciary duty to investors doesn't matter, that the case rises and falls on aiding and abetting breach of fiduciary duty to PCI. And we would submit that that is correct as a matter of law because they cannot bring a breach of fiduciary duty -- aiding and abetting breach of fiduciary duty to investor claim.

Finally, I want to address one of the main arguments that the plaintiff made in responding, and that's that the plaintiff now says that this evidence about M&I's duties to investors is relevant because he's now bringing claims for aiding and abetting fraud against and breaches of fiduciary duties to investors.

Now, maybe Mr. Marder backtracked on that earlier today, it's a little unclear to me, but if they do intend to proceed with those claims, our position is that they cannot assert those claims; and even if they could, they should not be allowed to shift their theory of liability at this late stage of the case.

Plaintiff has no standing to assert claims for wrongs against investors. He can only assert PCI's rights.

That's what *Ozark* holds. It's what *Senior Cottages* holds. That's what the *Duke* and *King* case from the Minnesota Bankruptcy Court holds. He therefore can't assert claims for aiding and abetting frauds against and breaches of fiduciary duties to creditors.

Again, *Duke* and *King* considered this issue. It's also addressed at length in a Fifth Circuit decision called *In re Seven Seas Petroleum*, 522 F.3d 575 at page 586, a 2008 case.

Now, plaintiff's fallback argument seems to be some version of a reverse derivative standing argument, that PCI can assert claims that -- claims for rights and injuries of creditors. There's really no such thing as reverse derivative standing. A derivative claim is when a shareholder or a creditor brings a claim on behalf of the corporation. A corporation can't bring claims on behalf of its creditors. And you see that in cases like *Medtronic* from the Minnesota Supreme Court and the *Seven Seas* case that I just mentioned.

Your Honor's ruling on the motion for leave to amend, I think, recognized this when it interpreted what the Bankruptcy Court had said about this kind of standing by, quote, saying this: "The Bankruptcy Court concluded that the trustee's claims are," quote, "derivative vis-a-vis the creditors because the trustee's claims involved direct harm

to PCI, but only incidental harm to PCI's creditors resulting from their status as creditors."

That's the ordinary understanding, that if the trustee is going to bring a claim, it has to be based on the rights of PCI and direct injury to PCI. It can't bring claims for wrongs against investors.

And, finally, I would note that for a long while in this case these aiding and abetting claims have been described as claims for breaches of fiduciary duty to PCI and fraud against PCI. That's the way the Bankruptcy Court described it in its motion for summary judgment ruling. That's how this Court described those claims in the motion for leave to appeal ruling. That's how this Court described those claims in the investor discovery ruling. That's how this Court described those claims last week in its *Daubert* rulings.

And plaintiffs themselves in their joint status letter and in their own trial brief, they describe the claim for aiding and abetting breach of fiduciary duty as being an aiding and abetting breach of fiduciary duty to PCI claim.

So I'll stop there and reserve maybe a minute for rebuttal, if that's okay with Your Honor. Thank you.

THE COURT: Thank you, Counsel.

MR. MARDER: Your Honor, again, I'll be pretty brief here because we addressed most of these points in our

opposing memorandum. I'll just make a few points.

Number one, this is not a motion in limine. This is -- they haven't even identified any evidence that they seek to exclude. This is a motion for summary judgment, and the courts have said that the motion in limine procedure is not an appropriate procedure to use for something that's summary judgment. And you, Your Honor, in your order specifically state that the parties shouldn't file motions in limine to re-argue issues they lost on summary judgment.

With regard to the standing arguments that we just heard, Your Honor, these arguments have been rejected not once, not twice, not three, but four times. These very same claims, claims 3 and 4 that they're arguing about, were the subject of a motion to dismiss on standing grounds in front of the Bankruptcy Court and the Bankruptcy Court upheld these claims, notwithstanding their motion for summary judgment.

In addition, the Court once again ruled against them on standing when they tried to assert it in connection with the summary judgment, and then this Court dealt with these issues on appeal and most recently in the *Daubert* order.

So I'm not going to address the standing issues that counsel addressed because the Court has already addressed them at length. I do want to address a couple of

points that BMO's counsel made.

One, they say they shouldn't be allowed -- that our side shouldn't be allowed to add certain theories at this late stage of the case. Your Honor, I would urge you to look back at our Amended Complaint, which the defendants have had in their possession for years, which specifically lays out the notion that this breach of fiduciary duty is not only owed to the investors -- I'm sorry, not only owed to PCI, but also to PCI's investors. So the notion that we're springing some new argument on them at a late stage is simply not true.

Lastly, Your Honor, the other point I would like to make is this notion that we need to establish that there was an affirmative act to be relevant.

As we set forth in our brief, we outlined in detail the evidence that we would be using to show why there is a duty owed to the investors, and that relied in part on the fact that BMO communicated directly with the investors and uttered to them certain half-truths.

And the Supreme Court of Minnesota has very clearly laid out that when you do interact with someone, you have a duty to make a full and fair disclosure and not to suppress or conceal material facts that would qualify those stated.

And therefore, under that law, it is very clear

that even if there was no standing, that there was a duty and a breach of a duty by the defendants. And that duty and breach of duty is clearly relevant because it is strong evidence that they acted with knowledge.

We have to prove in this case that the defendants acted with knowledge, and the fact that they knew that what the business model was, that the investors weren't told that the business model was false, and that they communicated directly with investors about certain agreements -- sham agreements is directly relevant to their knowledge.

So for those reasons, Your Honor, we certainly oppose this motion.

And, finally, Your Honor, I would just say with regard to the next motion, we can skip it because we can tell you that we are not offering the *Mohns* decision into evidence and therefore, unless opposing counsel disagrees, we don't need to address the third -- their third motion because we have withdrawn our request to even use that.

THE COURT: Thank you, Counsel.

MR. YOUNT: Thank you, Your Honor. I'll be very quick, and then I think my colleague will address the *Mohns* issue.

I just want to address what the Bankruptcy Court did at the dismissal stage. I think if you look at the order there, you're going to see that the Bankruptcy Court

only allowed Counts III and IV to go forward to the extent that it was based on harm directly done to PCI. And, in fact, the Court acknowledges their Complaint is vague about who they're bringing this on behalf of, but the Bankruptcy Court was very clear that they have to bring claims based on direct harm to PCI.

And so I will stop there and then cede the rest of my time. Thank you.

THE COURT: Thank you, Counsel.

MR. SCHAPER: Good afternoon, Your Honor. Mike Schaper from Debevoise for defendant.

We do want to be heard on *Mohns* because -- I'll rest on the briefs as to why it should be excluded, but what plaintiffs do in their opposition is, in effect, a motion for reconsideration of Your Honor's ruling last week that we will be able to put on rebuttal evidence on the spoliation issue.

The Court, relying on the *Stevenson* case from the Eighth Circuit, said that the bank will be able to put forward a, quote, innocent explanation for its conduct, closed quote. And the Court ruled that notwithstanding that there already has been a finding of bad faith.

The plaintiff now suggests a much narrower reading of the Court's order of the rebuttal evidence that BMO can put on and they say that the only issue for rebuttal is

whether the disposal of backup tapes was harmless. But that's not what the Court said.

The Court stated that in order for the defendant to be able to avoid unfair prejudice, quoting *Stevenson*, it said that we should be able to put on, as I said, an innocent explanation for our conduct.

The Court also noted that the Bankruptcy Court's ruling on this issue implied that the jury should be allowed to evaluate the facts and circumstances pertaining to the spoliation issue.

And we intend to put on evidence, Your Honor. We have one witness. And we understand that the Court said evidence is not going to be unlimited on this issue, but we have one primary witness on the issue. His name is John Vanderheyden. He was the IT head at M&I Bank at the time that the decommissioning project was underway that resulted in the disposal of backup tapes.

We look forward to the Court and the jury hearing his testimony, and he'll explain what the server consolidation project was about that led to the disposal of backup tapes. That's the very kind of, in our view, innocent explanation of conduct that the *Stevenson* court and the Eighth Circuit permits. In that case it was evidence regarding a document retention policy. Here it's evidence of a pre-existing server consolidation project.

The fact that the tape disposal occurred pursuant to a long planned consolidation project and that no M&I employees reviewed the tapes or the contents of them before their destruction makes it less likely that the crucial -- that any crucial evidence was destroyed.

Now, what plaintiff points to is that the Court said that the primary issue that the jury must decide is whether BMO employees likely destroyed crucial evidence that would have been favorable to plaintiff or harmful to defendant. But, of course, "primary" doesn't mean that that's the only evidence.

And in their brief the plaintiff does not address at all the Court's reliance on *Stevenson*, the Court saying that we should be able to put on evidence related to the innocence of our conduct; does not address at all the Court saying that the Bankruptcy Court implied that we should be able to put on evidence as to the circumstances of the alleged spoliation.

The plaintiff also suggests that the Court's exclusion of evidence of counsel conduct is consistent with plaintiff's very narrow interpretation about what rebuttal evidence should be. But that's also wrong, Your Honor.

Your Honor did a very standard 403 analysis as to whether counsel conduct should be able to be put in front of the jury and determined that the prejudice would outweigh

the probative value, period. That didn't undo what the Court at pages 7 and 8 said about allowing evidence as to the facts and circumstances of spoliation and the innocence of the bank's conduct.

So, again, we are heeding the Court's indication that spoliation evidence would not be unlimited. We plan on having one primary witness.

We're trying to stipulate to other facts about the spoliation issue with plaintiffs, as the Court suggested in its order. That includes some facts about the details and scope and volume of the documents that actually were produced by the bank, and we're working with them on a stipulation on that. They have some other stipulations proposed to us and we are working on those.

The only other possible evidence on this issue would be put forward by the plaintiff. They have some deposition designations that they would like to put forward, which we have some counters to, and they have one other fact witness that they've asked us to bring forward and we've agreed to that.

So, Your Honor, respectfully, their opposition really is a motion to reconsider what the Court did last week, and we think that should be seen as such and denied.

Thank you.

THE COURT: Thank you, Counsel.

MR. COLLYARD: Your Honor, I'll be brief. I wasn't prepared to argue this, but what I just heard was a brand-new motion and it was sitting here and trying to clarify what your recent order was. And as I understand your recent order, there is no way that anybody can come here and say that intent is at issue anymore in this case.

The only thing that's at issue in this trial is whether or not the documents that they intentionally destroyed were actually harmful to BMO or not. That's at least our interpretation of your order, Your Honor.

And that raises an issue that I think I need to address right now and get clarification on, because as a result of your order where you say that the Court will provide the jury with a permissive adverse inference, it raises the need to preview that issue for the jury as to why they're going to hear about whether or not documents were harmful to BMO or not on any type of destruction.

And so what I would do in my opening statement or what I would seek clarification from you on before doing it, Your Honor, is I need to raise this and tell the jury that BMO intentionally destroyed documents in this case, and at the end of the case you're going to provide an instruction on that issue and the Court has found that they intentionally destroyed evidence and the only issue is whether or not those documents were harmful or not to BMO.

They're going to hear evidence on that and preview that type of evidence.

So I raise that for clarification, Your Honor, and then I'll just address one more thing with respect to Mr. Vanderheyden.

Whether or not they did a recycling of tapes or anything like that, that all goes to intent. That has nothing to do about whether or not these documents were actually harmful to BMO or not.

MR. SCHAPER: Just very quickly, Your Honor.

Yes, it does go into intent. It goes to the ability to put on an innocent explanation that the *Stevenson* court and the Court -- and this Court last week said was permissible.

We're not disputing that both sides can open on this issue, but we don't think that the plaintiff can say what the Court will instruct the jury at the end and that's because that's what the Court told the parties last week.

The Court said, "As such, the Court" -- and this is on page 10. "As such, the Court will not provide an adverse inference instruction to the jury until after the evidentiary phase of trial has concluded, and the Court will conform the language of the instruction to be consistent with the evidence presented to the jury and any evidentiary rulings the Court issues during the trial."

So we think that's -- the suggestion from plaintiff's counsel has already been resolved and we think that the Court should stand by that.

MR. COLLYARD: Your Honor, there's a difference from you giving the adverse inference in a preliminary instruction, and that's what we had requested. Those cases talk about the damage from -- it coming from you versus me standing up and saying that they intentionally destroyed evidence and the Court has found that and that Your Honor will instruct them about that at the end of the case.

It would be just like standing up and talking about burden of proof or something and talking about how they'll be instructed on that at the end of the case. It would be no different, Your Honor.

So the harm that these cases are talking about is the harm that's inflicted because of the way the jury views you and when they hear you say it versus what I am going to say.

MR. SCHAPER: That's why he can get up and say the evidence will show that we intentionally destroyed evidence. He cannot get up and say that you found it, in his opening statement. That is a different thing and that's exactly -- for the reason Mr. Collyard just said, which is the cases that talk about why a preliminary adverse instruction is so harmful to a party; it's just that prejudice.

And so Mr. Collyard saying it is just as harmful -- if he says the Court already found, where is the daylight between that and the Court giving an adverse instruction preliminarily? I think that's the same thing, and they shouldn't allowed to do that.

THE COURT: I will make my ruling on this matter, and it will be clear and it will be abided by.

MR. COLLYARD: Thank you.

MR. SCHAPER: Thank you, Your Honor.

MS. MOMOH: Good afternoon, Your Honor. Adine Momoh from Stinson, LLP on behalf of BMO Harris Bank.

We are now on the final motion in limine that is being brought by BMO. This is the motion in limine to exclude evidence related to Bank of Montreal's finances.

The initial purpose of our motion, Motion in Limine 4, was to exclude three proposed exhibits that are on the plaintiff's exhibit list. Those documents, for the most part, concern a separate legal entity, an entity that's not a party to this lawsuit, the Bank of Montreal. The defendant in this case is BMO Harris Bank.

We have since received the plaintiff's opposition. We have a better sense now as to how they claim to use these particular exhibits. But what are these exhibits that we're talking about, Your Honor?

The first one is Plaintiff's Exhibit P-0296. This

is essentially a letter from Rosemary Spaziani -- I can spell that for the record -- S-p-a-z-i-a-n-i, to Colette A., C-o-l-e-t-t-e, Fried, F-r-i-e-d, dated January 17, 2002, enclosing an application to acquire Bank of the West, an application that was put forth by nonparties in this case. And, Your Honor, this document is over 400 pages long. So for purposes of the document that we attached to the Davis declaration, we only attached an excerpt.

The third [sic] document that we attached to our declaration is at Exhibit 2. It is Plaintiff's Exhibit P-0667. This is a SEC filing. It's a form SK that was filed in the month of December 2021, ten pages, but again this is a SEC filing that was used by a nonparty for purposes of this potential acquisition.

The third [sic] exhibit that we identified is Plaintiff's Exhibit P-0668. This is another SEC, Securities and Exchange Commission, filing, Form 10 -- excuse me, Form 40-F, dated December 2nd, 2021. This document is over 570 pages. It's exactly 575 pages. And, again, it's an SEC filing made by a nonparty, Bank of Montreal.

Now, these documents clearly are not relevant. We've identified in our brief the reasons why. I won't articulate that for purposes of my argument today. But, again, these documents largely concern Bank of Montreal and another nonparty, BMO Financial Corp., purchasing Bank of

the West.

And while this purchase is expected to close in 2002, this deal has not yet finalized. This is not relevant information.

Now, certainly the plaintiff contends that these documents are relevant for purposes of this case because not only do they concern information about this nonparty, they may also concern information about BMO, the defendant itself.

They make the argument in their papers that information of a parent entity, in this instance Bank of Montreal, is relevant to the subsidiary, here the Defendant BMO, and in doing so they rely on a Minnesota Court of Appeals case, the *Molenaar vs. United Cattle* decision by the Minnesota Court of Appeals.

But, Your Honor, that case and the analysis that they are relying upon is very limited, and even then the case is extremely distinguishable from the present case. I mean, there the court held that the parent's financial information was relevant to the subsidiary's financial condition for purposes of punitive damages because during the case admissions were made. Admissions were made with respect to there being identical corporate officers and directors between the parent and the subsidiary, there were shared bank accounts between the parent and subsidiary, and

all accounts were held by the parent in that case. We simply don't have those facts, Your Honor, here.

And even if the documents that plaintiffs are trying to offer are relevant, which we certainly do not concede, they are certainly prejudicial, unfairly prejudicial.

What other purpose could the plaintiff be seeking to admit evidence related to a potential acquisition involving a nonparty other than to confuse the issues, mislead the jury, cause undue delay, and simply waste this Court's time? We know all of these sorts of rationale are not permitted under Federal Rule of Evidence 403.

So that's where the papers stand, Your Honor. I offer a solution. We are mindful of your ruling on our bifurcation motion, the ruling that was in your September 29th order, Docket Number 214.

And that order with respect to our bifurcation motion, it touches a little bit on this very issue that we raise in our motion in limine, and I will just state some of the statements that you made in that order at page 58.

Financial condition of BMO could be relevant to liability and compensatory damages because it could -- likely will directly or indirectly suggest the nature of BMO's financial conditions.

You also stated, quote, Evidence relevant to

liability and compensatory damages will demonstrate the nature and scope of the banking industry in general and BMO's business in particular.

And, third, you stated that the evidence will also reflect, among other things, that billions of dollars passed through PCI's account.

Now, putting aside the fact of our position with respect to these statements, I mean, this was in your order as to how BMO's financial condition could possibly be relevant. And, again, we are not contesting your order for purposes of today.

But if that is true, the three exhibits that I just identified from plaintiffs certainly do not address these three buckets of statements that are in your order with respect to how BMO's financial condition could possibly be relevant to compensatory damages, liability, or even punitive damages if plaintiff gets to that stage.

So the solution that I present, Your Honor, is that we -- BMO, we would be willing to enter into some sort of stipulation. We would work in good faith with plaintiff's counsel to identify limited information about BMO's -- not Bank of Montreal, but BMO's financial condition that would certainly address these limited issues that you already have in your order, Your Honor.

If we have had that time, I -- again, we'll work

in good faith that we can reach agreement and we ask that once that stipulation is reached, that that be ordered and entered by the Court.

Your Honor, unless you have any questions, we respectfully request that you grant our motion in limine to exclude any evidence and argument with respect to Bank of Montreal's financial condition; and, in the alternative, with respect to entering into a stipulation as to limited information concerning BMO's financial condition, we propose to enter into a stipulation and submit that to the Court for approval.

Thank you.

THE COURT: Thank you, Counsel.

MR. MARDER: Your Honor, you indicated that we had a hard stop at 3:50. Do I have a couple of minutes here?

THE COURT: You have a couple of minutes.

MR. MARDER: Okay. Counsel for BMO said that these documents for the most part relate to the financials of the parent and that therefore they're clearly not relevant.

But what they gloss over is what we said in our brief, Your Honor, which is that these documents have very specific information in them about BMO Harris itself, not Bank of Montreal, the parent corporation, but BMO, the defendant.

In the merger application, we went through page by page and showed you where it included financial information about BMO Harris Bank in the merger application.

Similarly, Your Honor, in the 40-F, which is Exhibit 668, we went through and showed you the pages where they break out their financial information by various segments, including the BMO Harris segment.

So the whole notion that these are irrelevant because they don't include BMO Harris's information is categorically false.

Second of all, Your Honor, even to the extent they include information about the parent, that information is clearly relevant for two reasons.

If you look at the *Molenaar* decision, it talks about relying on the parent's financial condition, and it talks about doing that because of various factors showing control.

Here, we clearly have control because we know that BMO Harris, in its financial filings, files consolidated financial statements. And the only reason it can do that under the law, the only -- the test is whether they have the power to control the subsidiary. Not only to control it, but to control the subsidiary's returns.

And, second of all, Your Honor, the other reason why the parent's capital is relevant is because guess who

who bought Bank of the West for BMO Harris? Where did that capitol come from? It came from the parent company. If you look at the press release, they explain that they pay cash for the transaction, and that cash didn't come from BMO Harris. It came from within the larger Bank of Montreal transaction.

So we have a situation where there is control by the parent over the subsidiary, pervasive control, number one; and, number two, they are sharing capital back and forth and the parent is using its capital might to buy another bank for BMO Harris. So clearly if it has the ability to access that capital, then the parent's financial condition should be relevant.

So two points, Your Honor. Number one, these do include BMO Harris's financial information; and, number two, the parent's financial information is clearly relevant, as we set forth in our brief, because of the pervasive control and the fact that they share capital back and forth between the entities.

THE COURT: Thank you, Counsel.

All matters have been presented to the Court. They are taken under advisement. Thank you for your arguments today, and the Court will respond with orders regarding them. This concludes our hearing.

MR. GLEESON: Judge, can I ask just one question?

It only pertains to jury instructions to the extent you intend to address them at this point.

In light of your *Daubert* ruling, there needs to be adjustments to the proposed instructions. I assume at some later point we will have an opportunity to do that and there will be a charge conference.

I just wanted to tell you that because they are not a stationary target if the Court intends to rule on them at this point.

THE COURT: Thank you, Counsel.

MR. GLEESON: Thank you, Judge.

(Court adjourned at 4:00 p.m.)

* * *

We, Lori A. Simpson and Erin D. Drost, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Lori A. Simpson*
Lori A. Simpson, RMR, CRR

Certified by: *s/ Erin D. Drost*
Erin D. Drost, RMR, CRR